Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

JOHN ANTHONY MAGYAR,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

John Anthony Magyar entered a guilty plea to a sex offense in state court without having been advised by the trial court, or his court appointed legal counsel, that a sex offense conviction automatically results in being sentenced to lifetime registration as a sex offender. Magyar initially learned of mandatory lifetime sex offender registration at sentencing, and thereafter petitioned for post conviction collateral relief, seeking to set aside his plea due to the plea not having been knowingly, voluntary and intelligently made, and due to not having received effective assistance of counsel (among other grounds). The trial court denied Magyar's motion without affording Magyar a hearing and without requiring the State of Mississippi to file an answer. The Mississippi appellate courts affirmed. The questions presented are:

1. Do the due process principles of the Fifth Amendment to the United States Constitution require that trial courts advise criminal defendants of mandatory lifetime sex offender registration prior to accepting a guilty plea to a sex offense?

2. Does the Sixth Amendment right to effective assistance of counsel require that defense counsel advise criminal defendants of mandatory lifetime sex offender registration prior to the entry of a guilty plea to a sex offense?

QUESTIONS PRESENTED – Continued

This Court's ruling in *Padilla v. Kentucky*, Docket No. 08-651, currently on writ of certiorari, will impact this proceeding. As immigrants are exiled from the country upon conviction, persons charged with sex offenses are permanently exiled from society upon conviction, due to lifetime mandatory public registration.

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PETITION FOR WRIT OR CERTIORARI

The Petitioner, John Anthony Magyar, respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming his conviction.

OPINIONS BELOW

The August 13, 2009 opinion of the Mississippi Supreme Court affirming the Mississippi Court of Appeals decision is reported as *Magyar v. State of Mississippi,* 2009 Miss. Lexis 388, and is reproduced at App. 1. The September 23, 2008 opinion of the Mississippi Court of Appeals is reported at 2008 Miss. App. Lexis 558 and is reproduced at App. 14.

JURISDICTION

The decision of the Mississippi Supreme Court was issued on August 13, 2009, and rehearing was denied on October 22, 2009. The order denying rehearing is reported as *John Anthony Magyar v. State of Mississippi,* 2007-CT-00740-SCT, 2009 Miss. Lexis 505 and is reproduced at App. 48. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provision of the United States Constitution:

The Fourteenth Amendment to the Constitution of the United States provides in part that:

> **No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

The Fifth Amendment to the Constitution of the United States provides in part that:

> **No person shall . . . be deprived of life, liberty or property, without due process of law. . . .**

The Sixth Amendment to the Constitution of the United States provides in part that:

> **In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.**

STATEMENT OF THE CASE

John Anthony Magyar was convicted of sexual battery by guilty plea. Prior to his plea, he was not advised by the trial court or his court appointed counsel, that he would be sentenced to mandatory lifetime sex offender public registration. Thirty-five

days after his guilty plea, at his sentencing[1], Magyar was advised for the first time that he would be required to publicly register as a sex offender for the remainder of his life. Aggrieved, Magyar filed a petition for post conviction collateral relief under the Mississippi Uniform Post Conviction Collateral Relief Act, raising, among other claims, that his Fifth and Sixth Amendment rights had been violated, that his guilty plea was not freely, voluntarily and intelligently made and that he had not received effective assistance of counsel. The trial court summarily denied Magyar's petition, without requiring the State of Mississippi to file an answer. Magyar has not received a hearing to this day.

The Mississippi Court of Appeals Decision

The Mississippi Court of Appeals affirmed Mr. Magyar's conviction and sentence. The defense had raised on appeal the Fifth Amendment due process claim and Sixth Amendment right to effective counsel claim. This particular due process claim being a matter of first impression for the State of Mississippi, the Mississippi Court of Appeals looked to Nevada for guidance.

> **We find persuasive the Supreme Court of Nevada's opinion in *Nollette v. State*,**

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[1] Magyar was represented by a different public defender at sentencing due to plea counsel having moved to another state between the plea and sentencing dates.

> **46 P.3d 87 (Nev. 2002). In this case, the Nevada Supreme Court had to determine if Nollette's guilty plea was given knowingly, intelligently, and voluntarily even though he was not informed that he would have to register as a sex offender. *Nollette*, 46 P.3d at 89. The *Nollette* court stated that: the totality of the circumstances must demonstrate that a defendant pleaded guilty with knowledge of the direct consequences of his plea. Direct consequences are those ramifications that have a definite, immediate, and largely automatic effect on the range of the defendant's punishment. Collateral consequences, by contrast, do not affect the length or nature of the punishment and are generally dependent on either the court's discretion, the defendant's future conduct, or the discretion of a government agency. Because collateral consequences of a criminal conviction are often limitless, unforeseeable or personal to the defendant, requiring an advisement with respect to every conceivable collateral consequence would impose upon the trial court an impossible, unwarranted and unnecessary burden.**

Magyar v. State of Mississippi, No. 2007-CA-00740, 2008 Miss. App. Lexis 558.

In *Nollette*, the Nevada Court interpreted a statutory scheme that required the trial court to

inform the defendant of mandatory sex offender registration ***at sentencing***.

> **Before a sex offender is sentenced, the district court is required to inform the offender of the registration requirements.*fn14 The district court also is required to ensure that the defendant reads and signs a form acknowledging that the registration requirements have been explained.*fn15** ***Notably, however, the legislature does not require the district court to advise a defendant of the duty to register as a sex offender prior to accepting a guilty plea.*** **. . .**

Nollette at para. 25, emphasis added.

Also notably, and in contrast to Nevada, Mississippi trial courts are required by state statute to advise the defendant of mandatory sex offender registration prior to accepting his guilty plea.

> **The Court shall provide written notification to any defendant charged with a sex offense. . . . Such notice *shall* be included on any guilty plea forms . . .**

Miss. Code § 45-33-39(1) (1972), emphasis added.

Despite the stark differences between the Nevada and Mississippi statues concerning the

matter,[2] and the automatic, immediate, definite, non-discretionary nature of sex offender registration requirements in Mississippi, [3] the Mississippi Court of Appeals ruled "We find that the fact that Magyar must register as a sex offender is merely a collateral consequence of this guilty plea." *Magyar v. State of Mississippi*, No. 2007-CA-00740, 2008 Miss. App. Lexis 558.

Regarding Sixth Amendment effectiveness of counsel, the Mississippi Court of Appeals ruled that "As discussed above, Mississippi law does not require that Magyar be informed that he has to register as a sex offender for his guilty plea to be knowing, intelligent, and voluntary." *Magyar v. State of Mississippi*, No. 2007-CA-00740, 2008 Miss. App. Lexis 558; App. 14, at para. 21. The only "discussion above" in the court of appeals opinion was a discussion regarding the "collateral consequences rule" routinely used in due process analysis of guilty pleas. The Mississippi Court of Appeals, and later, the Mississippi Supreme Court by adopting the opinion of the Court of Appeals, thus decided the merits of the United States Constitutional Sixth Amendment claim by utilizing a hybrid *Strickland v. Washington*/collateral consequences due process analysis.

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[2] Nevada requiring offender registration requirement disclosure by the court prior to sentencing; Mississippi requiring disclosure by the court prior to plea.

[3] Thereby satisfying the Nevada (*Nollette*) definition of a "direct consequence."

The Mississippi Supreme Court Decision

The Mississippi Supreme Court granted certiorari and affirmed the conviction, relying primarily upon the reasoning of the Mississippi Court of Appeals regarding the effectiveness of counsel claim. The court addressed the state law claim concerning the clear statutory language requiring Mississippi trial judges to advise defendants of mandatory sex offender registration prior to guilty plea. The Court invalidated the statute, ruling that the state legislature had violated the state separation of powers doctrine by dictating what trial judges must advise a criminal defendant prior to plea before the judiciary.[4]

Regarding Magyar's due process claim, six justices of the Mississippi Supreme Court were of the opinion that:

> **The standard enunciated by the *Cuthrell* Court is followed by at least three other circuits, for a total of no fewer than seven of the twelve circuits in agreement on this point . . . Whether post-release registration is a collateral or direct consequence of a guilty plea is, admittedly, a close question; it certainly is definite and automatic.**

---

[4] Ironically, the court mused in footnote that it did not disagree with the statute it struck and would consider adopting the operative language thereof into the courts' own rules. Thus, what is good for the Mississippi Legislature and good for the Governor of Mississippi and good the Supreme Court of Mississippi, is, apparently, not suitable for the Mississippi citizen accused.

Magyar v. Mississippi, No. 2007-CT-00740-SCT (2009); 2009 Miss. Lexis 388; App. 12. The court found however, that although sex offender registration met the first two prongs of the test it adopted to distinguish collateral from direct consequences (definite and automatic), registration did not meet the third prong of the test, being "immediate." *Id.* At his initial sentencing, Magyar was sentenced to register as a sex offender. The "immediacy" prong of directness, therefore, was also met, though not so in the opinion of the Mississippi Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER FIFTH AMENDMENT DUE PROCESS PRINCIPLES REQUIRE TRIAL COURTS TO ADVISE CRIMINAL DEFENDANTS OF MANDATORY LIFETIME REGISTRATION IN A PUBLIC SEX OFFENDER DATA BASE IN ORDER FOR A GUILTY PLEA TO A SEX OFFENSE TO BE KNOWINGLY AND INTELLIGENTLY MADE; AND FURTHER, TO SETTLE THE QUESTION OF WHAT THE APPROPRIATE TEST SHOULD BE FOR DIFFERENTIATING BETWEEN DIRECT AND COLLATERAL CONSEQUENCES

Given the seriousness of a criminal conviction, the Constitution demands that a defendant only enter a guilty plea that is "voluntary . . . knowingly,

intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

The Mississippi Supreme Court's decision hinged on its holding on whether or not mandatory sex offender registration is a collateral or direct consequence of a guilty plea to a sex offense.

> . . . **[the distinction between direct and collateral consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment . . . For example, in *Cuthrell*, the Fourth Circuit Court of Appeals held that a defendant had knowingly pled guilty, notwithstanding the trial court's failure to advise him that he might lose his accrued "good time" credit period. This was so, the panel reasoned, because "while the loss would increase the period of his actual confinement, it [was] not a definite, practical consequence of the plea, but [was] discretionary with the prison authorities," and therefore was a collateral consequence . . . On the other hand, "[u]nder this standard, direct consequences include a mandatory special parole term, ineligibility for parole, and the maximum punishment provided by**

> **law." The standard enunciated by the *Cuthrell* Court is followed by at least three other circuits, for a total of no fewer than *seven of the twelve circuits* in agreement on this point . . .**

Magyar v. Mississippi, No. 2007-CT-00740-SCT (2009), at paras. 16 and 17; 2009 Miss. Lexis 388; App. 11, emphasis added. Thus, as summarized by the Mississippi Court, all circuits are apparently not in agreement on the proper test for distinguishing between collateral and direct consequences of a guilty plea.

Further, some courts have specifically held that mandatory sex offender registration is a direct consequence of a guilty plea and thus, advisement of such requirements is a prerequisite to a constitutionally informed and adequate guilty plea to a sex offense.

> **Under long and well-established principles, a trial court is obligated to advise a defendant of the direct consequences of a plea of guilty or no contest to a felony or misdemeanor before it takes the plea. This obligation includes the duty to advise of the requirement to register as a sex offender upon conviction of a statutorily enumerated offense. Failure to advise of the sex registration requirement is error.**

People v. Zaidi, 147 Cal. App. 4th 1470, 55 Cal. Rptr. 3d 566 (Cal. App. Dist. 1 2007) at para. 68, internal citations omitted. Moreover, many state courts have

specifically held that mandatory sex offender registration is a "collateral" consequence of a conviction and therefore, due process does not demand pre-plea advisement of registration requirements.

Thus, the states are not in agreement concerning whether or not criminal defendants must be informed by the trial courts of mandatory lifetime sex offender registration, prior to a court accepting a guilty plea to a sex offense. In addition, the states are not in agreement as to what the appropriate test should be for determining what is and what is not a "direct" consequence of a criminal conviction. *See, e.g., United States v. Salerno,* 66 F.3d 544, 551 (2d Cir. 1995) (a consequence is direct if it has a definite, immediate, and largely automatic effect on the range of punishment); *Mitschke v. State,* 129 S.W.3d 130, 135 (Tex. Crim. App. 2004) (a consequence of a guilty plea is direct if it is punitive); *El-Nobani v. United States,* 287 F.3d 417, 421 (6th Cir. 2002) (a consequence is direct if it is within the "control and responsibility" of the sentencing court); Jenny Roberts, *The Mythical Divide Between Collateral And Direct Consequences Of Criminal Convictions: Involuntary Commitment Of "Sexually Violent Predators,"* 93 Minn. L. Rev. 670, 689-93 (2008) (discussing tests formulated by lower courts to define "direct" consequences).

Therefore, this Court should grant certiorari to settle the inconsistency among the courts as to whether or not mandatory lifetime sex offender public registration is a direct or collateral consequence of a sex offense conviction; and, to settle the confusion

among the circuits and state courts regarding what the appropriate test should be for differentiating between direct and collateral consequences of a felony criminal conviction.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SIXTH AMENDMENT GUARANTEE TO EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES DEFENSE COUNSEL TO ADVISE HIS CLIENT, PRIOR TO PLEA, THAT A PLEA OF GUILTY TO A SEX OFFENSE AUTOMATICALLY RESULTS IN IMMEDIATE MANDATORY LIFETIME SEX OFFENDER PUBLIC REGISTRATION

This case raises important questions about what the Sixth Amendment to the United States Constitution demands, when it demands "effective" assistance of counsel. Defense counsel are not charged with a constitutional responsibility of advising clients of all possible consequences of a guilty plea; but, when a consequence is definite (automatic, non-discretionary), readily identifiable by counsel and severe to the point of restricting the defendant's movement in society for the remainder of his life, subjecting him to public ridicule for the remainder of his life and subjecting him to criminal liability if he fails to comply with the consequence now placed upon him, failure to advise him of such consequence prior to his plea constitutes ineffective assistance of counsel, whether or not such consequence is deemed a

"direct" consequence which the trial court must advise him of prior to his plea. Restated, *"[D]efense counsel should be expected to discuss with his client the range of risks* attendant [to] his plea." Wayne R. LaFave, et al., *Criminal Procedure* (3rd ed. 2008) § 21.4(d) at 829, emphasis added.

Moreover, Magyar's counsel effectively mis-advised him regarding registration. Counsel advised Magyar that to plea guilty to the sex offense would be "getting it over with" and "getting on with his life." This issue of mis-advice was raised by Magyar in his petition for post conviction relief, but largely ignored by the lower courts. App. 54, at para. IX. This Court's decision in *Padilla v. Kentucky*, Docket No. 08-651, will have direct impact on whether counsel's implications to Magyar that no significant consequences would follow his conviction, when in fact swift, certain and severe consequences would follow, constitutes ineffective assistance of counsel.

The Mississippi sex offender registration statute is extremely broad, severe and inclusive with regard to (1) who must register for life and (2) how the registrant is forever limited. It includes minors adjudicated delinquent in Youth Court, and persons found not guilty by reason of insanity. *See* Miss. Code § 45-33-27(1) (1972). Those subject to the statute:

> -will submit address, name, place of employment, date of birth, age, race, sex, height, weight, hair color, place of birth, date and place of Court adjudication and social security number and "any other identifying

factors" to the local law enforcement of any community she shall ever live in

-submit DNA samples to law enforcement, to be included in computer data base

-submit fingerprints to be included in data base

-submit to law enforcement any online username, screen name or online identity he has ever used

-submit to law enforcement information regarding any anticipated future residence

-may not reside within 1500 feet (500 yards) of any public or private school (or its property)

-may not reside within 1500 feet of any child care facility

-may not reside within 1500 feet of any playground[5]

-may not reside within 1500 feet of any ball park "or other recreational facility"

-may not be present in a school, or stand within 500 feet of a school without special permission[6]

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[5] 2008 amendment to Miss. Code § 45-33-25(4)(a) (1972) as amended.

[6] Miss. Code § 45-33-26 (1972) as amended.

> -must show proof of domicile and personally appear at the Department of Public Safety 10 days before moving to another residence
>
> -personally appear at the Department of Public Safety within 3 days of any change of employment Miss. Code § 45-33-29(3)
>
> -personally appear at the Mississippi Department of Public Safety, **every 90 days,** for the remainder of her life, give a new photo, update all information, including residence and employment,[7] and pay "**any required fees.**"

Registrant information will be placed on the internet, for the world to see, forever. The registrant will be a target of identity theft, be the subject of ridicule and scorn, people will protest if he moves to the neighborhood, parents will not let their children play with his children, and he will have extreme difficulty finding employment. Magyar, of course, represents thousands of criminal defendants facing charges of sexual misconduct, often facing attractive plea offers of minimum incarceration or probation, who have no idea that accepting such an offer actually triggers a life sentence of exile. Without question, the Mississippi registration act imposes onerous permanent obligations and burdens upon the life of the registrant.[8] It is not burdensome however,

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[7] Miss. Code § 45-33-31 (1972) as amended.

[8] The Mississippi statutory scheme is similar in restriction to Alaska's registration act. "As JUSTICE STEVENS and

(Continued on following page)

upon competent legal counsel, to advise the client, at least to some minimal extent, that public registration would be required upon a guilty plea.

The "collateral v. direct" consequence due process analysis should not be applied to ineffective assistance of counsel claims under the Sixth Amendment. In other words, the duty of the court and the duty of defense counsel are different. "The collateral consequences rule does not capture, even as a rule of thumb, . . . the concerns of competent lawyers or their clients, . . . [and] should be irrelevant to a *Strickland* analysis." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 712 (2002). The duty of defense counsel is broader than of the court. Unlike the court, defense counsel must investigate and advise the defendant of the advantages and disadvantages of a plea. *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). Failure to give advice may therefore, form the basis of a claim of ineffective assistance of counsel. In this particular case, Magyar was not advised regarding a serious disadvantage to pleading guilty and has sufficiently claimed that had he known of the registration requirements, he would not have plead guilty. *App. 54, 60-61, 77.* He was not afforded a hearing in order

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JUSTICE SOUTER spell out, Alaska's Act imposes onerous and intrusive obligations on convicted sex offenders . . . " *Smith v. Doe*, 583 U.S. 84 (2003). Justices Ginsburg and Breyer dissenting.

to better prove his claim primarily because the Mississippi courts labeled his grievance as concerning merely a "collateral" consequence to his plea. To the contrary, the mandatory permanent registration requirements was the most direct, definitely known (to all but Magyar) aspect of his plea and will be the most long lasting and ultimately restrictive aspect of his sentence. The term of incarceration Magyar could have been sentenced to was discretionary, within a certain range; the fine which could have been imposed upon him was discretionary, within certain limits; the registration requirements however, were concrete; the court had no discretion to ignore, limit or enhance Magyar's long lasting public registration requirements. The "collateral v. direct" consequences analysis should not apply to Sixth Amendment claims, but even if that standard is applied and approved by this Court, mandatory lifetime sex offender registration should be recognized as a direct consequence to a guilty plea to a sex offense.

This Court should grant certiorari to settle the uncertainty and misapplication of the law among the lower courts regarding whether the Fifth Amendment, due process, collateral consequences rule should be applied to Sixth Amendment effective assistance of counsel claims, and, to determine whether or not failure to advise a client that his guilty plea will immediately result in mandatory, lifetime, public sex offender data base registration (at

the risk of further prosecution should he fail to register) constitutes ineffective assistance of counsel.

CONCLUSION

Sex offender registration requirements in nearly all states impose great and permanent burdens and restrictions upon the lives of registrants. Some states, including Mississippi, limit where offenders may reside and require a personal appearance registration update, every 90 days, at the local Sheriff's office or other government agency. Updates must also be given in other instances such as whenever the registrant changes residence or his or her physical appearance. Failure to strictly comply constitutes a separate felony offense. Much information about the offender is placed in the public domain for all to see. The offender is forever shunned from normal society. The registration requirements are the most definite, automatic and immediate consequences of a guilty plea to a sex offense. Other aspects of sentencing are discretionary with the trial court, while registration requirements are not discretionary. However, despite the severe, automatic nature of sex offender registration requirements, most states have determined that such requirements are mere collateral consequences to a guilty plea and therefore, Fifth Amendment Due Process does not require trial courts to advise criminal defendants of the fact of registration requirements prior to accepting a guilty plea to a sex offense. In contrast, some courts have determined

that trial courts must advise defendants of sex offender registration requirements before a guilty plea may be constitutionally entered. Additionally, the courts have adopted various tests to determine whether or not a consequence is collateral or direct. With regard to Fifth Amendment Due Process concerns, this Court should grant certiorari to settle the question and inconsistency among the courts regarding (1) whether or not mandatory sex offender registration requirements are a direct or collateral consequence to a guilty plea to a sex offense and (2) what the proper analysis is for determining whether or not a particular consequence is a "direct" or "collateral" consequence.

In relation to Magyar's Sixth Amendment claim, some courts have held that counsel's failure to advise a criminal defendant of mandatory sex offender registration constitutes ineffective assistance of counsel (especially where elements of mis-advice are present as in Magyar's case), while the majority of courts have ruled to the contrary. More often than not, courts failing to find ineffective assistance of counsel in these circumstances reach its conclusion by applying the Fifth Amendment Due Process "collateral consequence" analysis. Such analysis is erroneous as effective counsel's duty to the defendant is much more broad and different from the duties of the court. This Court should grant certiorari to settle the questions of whether the Fifth Amendment Due Process collateral consequences rule should be applied to Sixth Amendment ineffective assistance of

counsel questions and specifically, to settle the dispute as to whether or not counsel's failure to advise a client of mandatory lifetime sex offender registration constitutes ineffective assistance of counsel under the Sixth Amendment to the United States Constitution.

For the reasons as set forth above, the petitioner submits that his rights under the Fifth and Sixth Amendments to the United States Constitution have been violated and requests that appropriate relief be granted unto him, including, but not limited to his plea of guilty being vacated and set aside.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CT-00740-SCT

JOHN ANTHONY MAGYAR

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	04/05/2007
TRIAL JUDGE:	HON. W. ASHLEY HINES
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES LEE KELLY
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAURA HOGAN TEDDER
DISTRICT ATTORNEY:	JOYCE I. CHILES
NATURE OF THE CASE:	CIVIL – POST-CONVICTION RELIEF
DISPOSITION:	AFFIRMED – 08/13/2009
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

DICKINSON, JUSTICE, FOR THE COURT:

¶1. John Anthony Magyar claims that, prior to pleading guilty to the crime of sexual battery, he was not told he would be required to register as a sex offender. The trial court summarily dismissed his motion for post-conviction relief without a hearing. The Court of Appeals affirmed that dismissal, we granted certiorari, and we now affirm.

BACKGROUND FACTS AND PROCEEDINGS

¶2. After John Anthony Magyar was indicted by a Washington County grand jury for one count of sexual battery, he filed a "petition to enter plea of guilty." His plea petition disclosed the maximum and minimum penalties for the crime of sexual battery, but did not disclose that he would be required to register as a sex offender, and the trial judge did not mention it during the plea colloquy. The trial judge accepted Magyar's guilty plea and ordered a pre-sentence investigation, following which he sentenced Magyar to twenty years in prison, with ten years suspended, followed by five years supervised probation. Additionally, the judge ordered Magyar to register as a sex offender.

¶3. Magyar filed a motion for post-conviction relief in the trial court, asserting that his plea and sentence should be set aside for various reasons, including that his guilty plea was not freely, voluntarily and intelligently made, and that neither the trial judge nor his attorney informed him that he would be required to register as a sex offender.

¶4. After the trial court summarily denied his motion without a hearing, Magyar filed a "motion to reconsider motion for post-conviction relief," which the trial court treated as a Rule 60 motion and denied. Magyar appealed. The Court of Appeals affirmed. ***Magyar v. State***, No. 2007-CA-00740, 2008 WL 4308220 (Miss. Ct. App. Sept. 23, 2008). Although we find no error in the Court of Appeals' opinion or disposition of this case, we granted certiorari to address the statutory mandate that trial judges inform criminal defendants – prior to accepting their guilty pleas – of the requirement to register as a sex offender.

ANALYSIS

¶5. In his petition for post-conviction relief, Magyar asserted, inter alia, that he should have been allowed to withdraw his guilty plea because the trial court did not inform him, prior to accepting his guilty plea, that he would be required to register as a sex offender. The trial court denied Magyar's petition without a hearing. Because the question presented is legal, rather than factual, we analyze it de novo. ***Brown v. State***, 731 So.2d 595, 598 (Miss.1999).

Miss.Code Ann. § 45-33-39

¶6. Section 45-33-39(1) requires a trial judge – prior to accepting a guilty plea from a defendant charged

with a sex crime[1] – to provide the defendant written notification of the registration requirement and obtain "a written acknowledgment of receipt" of the written notification. Specifically, the statute provides, in part:

> The court shall provide written notification to any defendant charged with a sex offense as defined by this chapter of the registration requirements of Sections 45-33-25 and 45-33-31. Such notice shall be included on any guilty plea forms and judgment and sentence forms provided to the defendant. The court shall obtain a written acknowledgment of receipt on each occasion.

Miss.Code Ann. § 45-33-39(1) (Rev. 2004).

¶7. It should come as no surprise that few states have statutes similar to Section 45-33-39(1). A basic tenet of American government is judicial independence, and every state has a judicial branch of government separate from its legislative branch. We hold firm to the principle that Mississippi's legislative branch of government may not, through procedural legislation, control the function of the judiciary. *See* Miss. Const. art. 1, § 1 ("The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another,

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[1] See Miss. Code Ann. §§ 45-33-25 & -31 (Rev. 2004).

and those which are executive to another."); Miss. Const. art. 1, § 2 ("No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others."); Miss. Const. art. 6, § 144 ("The judicial power of the State shall be vested in a Supreme Court and such other courts as are provided for in this Constitution."). Stated another way, this Court cannot – consistent with the Mississippi Constitution – relinquish to the Legislature the duties and powers constitutionally imposed upon the Supreme Court.

¶8. Indeed, our subservience to legislation that mandates what our trial judges must say to a defendant in a courtroom during a plea hearing would be tantamount to both an abdication of our judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative. Thus, we hold today that Mississippi Code Annotated Section 45-33-39(1) confers no right on a criminal defendant charged with a sex crime and imposes no duty on our trial judges.[2] Although we find that a trial judge is not required, prior to accepting a guilty plea, to inform a defendant of the sex offender registration laws, we must still

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[2] Our decision today is no indication that we disapprove of the Legislature's idea. To the contrary, the matter has been referred to our rules committee which has taken the provisions of the statute under advisement and will submit it to the normal process associated with the enactment of rules affecting the judiciary.

decide whether the registration requirement is a "material" consequence of a guilty plea, or a "collateral" consequence only.

Material and collateral consequences

¶9. The decision to plead guilty has consequences. Some are material, and some are collateral. Material consequences are those of which a defendant must be aware in order to knowingly and intelligently waive the numerous substantive and procedural rights guaranteed by the constitution to a defendant in a criminal case. A defendant must be fully informed of the material – or direct – consequences prior to entering a plea of guilty; conversely, there is no requirement that a defendant be informed of the collateral consequences.[3]

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[3] Although Mississippi has no case directly on point, we find persuasive the reasoning of our sister state, Alabama. *See* ***Robinson v. State,*** 730 So. 2d 252, 254 (Ala. Crim. App. 1998) ("'An accused is entitled to information concerning the direct consequences of his plea. He is not entitled to information concerning all collateral effects, or future contingencies that might arise.'") (internal citations omitted). *See also* ***Nollette v. State,*** 46 P.3d 87, 89 (Nev. 2002) ("[T]he totality of the circumstances must demonstrate that a defendant pleaded guilty with knowledge of the direct consequences of his plea . . . Because collateral consequences of a criminal conviction are often limitless, unforeseeable or personal to the defendant, requiring an advisement with respect to every conceivable collateral consequence 'would impose upon the trial court an impossible, unwarranted and unnecessary burden.'") (internal citations omitted).

¶10. For instance, upon conviction of certain crimes,[4] a person loses the privilege to vote. And supervised probation – which accompanies most felony sentences – will result in substantial personal restrictions and reporting requirements. Furthermore, and more on point here, conviction of a felony carries with it a certain societal stigma. Some organizations, employers, and clubs restrict membership and employment to persons who have never been convicted of a felony. Our system of justice does not expect – and the Constitution does not require – our trial judges to inform defendants of these or other collateral consequences of pleading guilty to a felony.

¶11. We decide today, as an issue of first impression in Mississippi, whether the requirement to register as a sex offender is a material or collateral consequence of a guilty plea. After due consideration, we find that the requirement to register as a sex offender is a collateral consequence of a guilty plea, and the trial court will not be put in error for failing to advise Magyar of the registration requirements before accepting his guilty plea. Although we do not recognize the law of other states as controlling precedent, our decision today is nevertheless aided by the viewpoint

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[4] Crimes which disqualify a person as an elector are murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement and bigamy. Miss. Const. art. 12, § 241. *See also* Miss. Code Ann. § 23-15-19 (Rev. 2007).

of virtually every other jurisdiction to address the question.[5]

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[5] *See, e.g.*, ***Robinson v. State***, 730 So. 2d 252, 254 (Ala. Crim. App. 1998) (sex offender registration is a collateral consequence of a guilty plea); ***State v. Young***, 542 P.2d 20, 22 (Ariz. 1975) (same); ***People v. Montaine***, 7 P.3d 1065, 1067 (Colo. Ct. App. 1999) (same); ***State v. Scott***, 2003 Del Super. 2003 WL 21204469 at *1 (Del. Super. Ct. May 19, 2003) (same); ***State v. Partlow***, 840 So. 2d 1040, 1043-44 (Fla. 2003) (same); ***Foo v. State***, 102 P.3d 346, 358 (2004) (Haw. same); ***Ray v. State***, 982 P.2d 931, 935 (Idaho 1999) (same); ***People v. Taylor***, 561 N.E.2d 393, 393 (Ill. App. Ct. 1990) (registration requirement is not penal in nature, and thus not part of the sentencing procedure); ***State v. Jefferson***, 759 N.W.2d 3 (Table), 2008 WL 4531454 at *3 (Iowa App. Oct. 1, 2008) (sex offender registration is a collateral consequence of a guilty plea); ***State v. Legg***, 13 P.3d 355, 358 (Kan Ct. App. 2000) (same); ***Carpenter v. Commonwealth***, 231 S.W.3d 134, 137 (Ky. Ct. App. 2007) (same); ***Commonwealth v. Shindell***, 827 N.E.2d 236, 238 (Mass. App. Ct. 2005) (same); ***In re Lyons***, 2000 WL 33389824 at *1 (Mich. App. Dec. 19, 2000) (same); ***Ramsey v. State***, 182 S.W.3d 655, 659 (Mo. Ct. App. 2005) (same); ***State v. Torres***, 574 N.W.2d 153, 155 (Neb. 1998) (registration requirements are separate and collateral to any sexual offense which the act affects); ***Nollette v. State***, 46 P.3d 87, 90 (Nev. 2002) (sex offender registration is a collateral consequence of a guilty plea); ***Doe v. Poritz***, 662 A.2d 367, 406 n.18 (N.J. 1995) (same); ***State v. Moore***, 86 P.3d 635, 643 (N.M. Ct. App. 2004) (same) ***People v. Clark***, 704 N.Y.S.2d 149, 151 (N.Y. App. Div. 2000) (same); ***Davenport v. State***, 620 N.W.2d 164, 166 (N.D. 2000) (same); ***State v. Omiecinski***, 2009 WL 626114 at *4 (Ohio App. March 12, 2009) (same); ***Rodriguez-Moreno v. State***, 145 P.3d 256, 259 (Or. Ct. App. 2006) (same); ***Commonwealth v. Leidig***, 956 A.2d 399, 406 (Pa. 2008) (same); ***Williams v. State***, 662 S.E.2d 615, 618 (S.C. Ct. App. 2008) (same); ***State v. Timperley***, 599 N.W.2d 866, 869 (S.D. 1999) (same); ***Ward v. State***, 2009 WL 113236 at *9, (Tenn. Crim. App. January 14, 2009) (same); ***State***

(Continued on following page)

CONCLUSION

¶12. We hold today that judicial rules – such as the rules of evidence, civil procedure, criminal procedure, and professional conduct – neither come from the Legislature nor require legislative approval. Accordingly, we hold that Section 45-33-39(1) confers no procedural right on a defendant in a criminal case and imposes no judicial duty on a trial judge. We also hold that the duty to register as a sex offender is a collateral consequence of a guilty plea. All other aspects of the decision of the Court of Appeals in this matter are adopted herein. Accordingly, we affirm the judgments of the Court of Appeals and the Washington County Circuit Court.

¶13. **AFFIRMED.**

WALLER, C.J., CARLSON, P.J., RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. GRAVES, P.J., CONCURS IN RESULT ONLY. KITCHENS, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY WALLER, C.J., CARLSON, P.J., DICKINSON, LAMAR AND PIERCE, JJ. CHANDLER, J., NOT PARTICIPATING.

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v. Ward, 869 P.2d 1062, 1076 (Wash. 1994) (same); *State v. Bollig*, 605 N.W.2d 199, 206 (Wis. 2000) (the duty to register is a collateral consequence of a guilty plea, because it does not constitute punishment); *Johnson v. State*, 922 P.2d 1384, 1387 (Wyo. 1996) (trial court committed no error by failing to advise a defendant about the registration requirement).

KITCHENS, JUSTICE, CONCURRING:

¶14. I agree with the majority's decision to affirm the dismissal of Magyar's motion for post-conviction relief and its conclusion that the registration requirement incidental to conviction as a sex offender is a collateral, rather than direct, consequence of a valid guilty plea. I write separately, however, to clarify the distinction between these effects.

¶15. To be sure, the notions of direct and collateral consequences are amorphous concepts that elude simple definition. Nevertheless, the considerable attention given to the subject by our sister jurisdictions suggests that this body of law affords no space to a middle ground; consequences to a plea of guilty are either direct or collateral. Therefore, when confronted by this issue in the future, the judges of this state must decide upon which side of the dividing line a given consequence falls.

¶16. Today, we hold correctly that post-release registration as a sex offender is a collateral consequence to an admission of guilt, as have several other states. *See e.g.*, ***Commonwealth v. Leidig***, 598 Pa. 211, 956 A.2d 399 (2008); ***State v. Ward***, 123 Wash. 2d 488, 869 P.2d 1062 (1994). *See also* ***Bessey v. State***, 239 S.W.3d 809 (Tex. Crim. App. 2007). To conclude that the instant case falls to the collateral side of the fine line in question does not, of course, settle the larger question of where, exactly, that line lies. In my view, "[t]he distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the

relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." ***George v. Black***, 732 F.2d 108, 110 (8th Cir. 1984) (quoting ***Cuthrell v. Director***, 475 F.2d 1364, 1366 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005, 94 S. Ct. 362, 38 L. Ed. 2d 241 (1973)). For example, in ***Cuthrell***, the Fourth Circuit Court of Appeals held that a defendant had knowingly pled guilty, notwithstanding the trial court's failure to advise him that he might lose his accrued "good time" credit period. This was so, the panel reasoned, because "while the loss w[ould] increase the period of his actual confinement, it [was] not 'a definite, practical consequence of the plea' but [was] discretionary with the prison authorities," and therefore was a collateral consequence. 475 F.2d at 1366 (quoting ***Hutchison v. United States***, 450 F.2d 930, 931 (10th Cir. 1971)). On the other hand, "[u]nder this standard, direct consequences include a mandatory special parole term, ineligibility for parole, and the maximum punishment provided by law." ***Torrey v. Estelle***, 842 F.2d 234, 236 (9th Cir. 1988).

¶17. The standard enunciated by the ***Cuthrell*** Court is followed by at least three other circuits, for a total of no fewer than seven of the twelve circuits in agreement on this point. ***Virsnieks v. Smith***, 521 F.3d 707 (7th Cir. 2008); ***Steele v. Murphy***, 365 F.3d 14 (1st Cir. 2004); ***United States v. U.S. Currency in the Amount of $228,536.00***, 895 F.2d 908 (2d Cir. 1990). *See also* ***Redwine v. Zuckert***, 317 F.2d 336

(D.C. Cir. 1963). As I read today's majority opinion, we have chosen to adhere to this standard. Whether post-release registration is a collateral or direct consequence of a guilty plea is, admittedly, a close question; it certainly is definite and automatic. However, it is not as immediate and direct a result as, for example, a term of imprisonment or the imposition of a fine. The Mississippi Court of Appeals implicitly adhered to this reasoning in 2005 when it affirmed the conviction, pursuant to a plea of guilty, of a defendant whom the trial judge explicitly advised was waiving his right to direct appeal. ***Sykes v. State***, 895 So. 2d 191, 195 (Miss. Ct. App. 2005). The resulting loss of the right to appeal certainly was definite, immediate, and automatic; but because the trial judge advised the defendant on the record of this consequence, the appellate court rightly determined that the defendant knowingly had pled guilty. *Id. See also* ***Young v. State***, 797 So. 2d 239, 245-46 (Miss. Ct. App. 2001).

¶18. The court's judgment in *Sykes* was correct for precisely the same reason that I concur in today's decision: where a consequence of a valid guilty plea is definite, immediate, and largely automatic, that consequence is direct, rather than collateral; and where a defendant seeking to plead guilty has been advised of the direct consequences of that decision, that plea obviously is made knowingly. In cases such as the one before us today, when a guilty plea results in consequences that do not meet that three-pronged

description, a defendant is not entitled to judicial admonition.[6]

¶19. Because this Court implicitly follows that path in reaching today's correct decision, I concur with the majority opinion.

WALLER, C.J., CARLSON, P.J., DICKINSON, LAMAR AND PIERCE, JJ., JOIN THIS OPINION.

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[6] Obviously, if a given consequence of a guilty plea leaves doubt as to whether it is collateral or direct in nature, the trial judge's most prudent route is to advise the defendant thereof.

2008-MS-0924.150
MAGYAR v. STATE

JOHN ANTHONY MAGYAR, APPELLANT
v.
STATE OF MISSISSIPPI, APPELLEE.

No. 2007-CA-00740-COA.

Court of Appeals of Mississippi.

September 23, 2008

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT
TRIAL JUDGE: HON. W. ASHLEY HINES,
DATE OF JUDGMENT: 04/05/2007

DISPOSITION: AFFIRMED.

ATTORNEY FOR APPELLANT: JAMES LEE KELLY

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: LAURA HOGAN TEDDER

BEFORE LEE, P.J., GRIFFIS AND ROBERTS, JJ.

GRIFFIS, J., FOR THE COURT:

¶1. John Anthony Magyar appeals the Washington County Circuit Court's order denying his motion for post-conviction collateral relief. Magyar asserts that: (1) his plea was not knowingly, intelligently, and voluntarily given; (2) his counsel was ineffective; and (3) the trial court erred by not ordering an evidentiary hearing.

FACTS

¶2. Magyar pleaded guilty to sexual assault. At the time of his guilty plea, Magyar was a high school teacher. During the hearing, Magyar testified that his plea was given freely, voluntarily, and without coercion. The trial judge listed every right that Magyar was waiving, and Magyar stated that he understood that he was waiving those rights and that he still wanted to plead guilty. Magyar acknowledged the elements of his crime and then pleaded guilty.

¶3. On August 22, 2005, the trial court sentenced Magyar to twenty years with ten years suspended and five years of probation. The trial court also ordered Magyar to register as a sex offender under Mississippi Code Annotated section 45-33-25 (Rev. 2004).[1]

STANDARD OF REVIEW

¶4. In reviewing a trial court's decision to deny a motion for post-conviction collateral relief, the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Smith v. State*, 806 So. 2d 1148, 1150 (¶3) (Miss. Ct. App. 2002).

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[1] The current, revised version of the statute is found at Mississippi Code Annotated section 45-33-25 (Supp. 2007).

ANALYSIS

I. Was Magyar's plea knowing, intelligent, and voluntary?

A. Sex Offender Registration

¶5. Magyar argues that his plea was not given knowingly, intelligently, and voluntarily because neither his attorney nor the trial judge informed him that he would have to register as a sex offender before he was sentenced. During the guilty plea hearing, the trial judge stated, "do you understand that you're making an open plea, . . . I am not bound by anything anybody has told you. If I thought it was appropriate in your case to sentence you to 30 years . . . that's within my discretion. Do you understand that?" Magyar responded, "[y]es, sir."

¶6. This Court has previously held that:

> The burden of proving that a guilty plea was not made voluntarily is on the defendant. If this burden is not met, the defendant's plea must be upheld as one that was made voluntarily, knowingly and intelligently. It should be noted that "solemn declarations in open court [by a defendant] carry a strong presumption of verity." Further, the record must reflect that the trial court thoroughly discussed with the defendant all of the consequences of a *guilty plea, including the waiver of rights, satisfaction with one's attorney and advisement on the maximum and minimum penalties one can acquire for the crime committed.*

Barnes v. State, 803 So. 2d 1271, 1274 (¶10) (Miss. Ct. App. 2002) (internal citations omitted) (emphasis added). We, therefore, must determine if failure to advise Magyar of the requirement to register as a sex offender equates to a failure to advise Magyar of the maximum or minimum penalty for the crime of sexual assault or a waiver of his rights.

¶7. Mississippi Code Annotated section 45-33-25(1), which was applicable at the time, states, "[a]ny person residing in this state who has been convicted of any sex offense . . . shall register with the Mississippi Department of Public Safety." Other jurisdictions have decided cases based on statutes similar to our section 45-33-25. We find persuasive the Supreme Court of Nevada's opinion in *Nollette v. State,* 46 P.3d 87 (Nev. 2002).

¶8. In this case, the Nevada Supreme Court had to determine if Nollette's guilty plea was given knowingly, intelligently, and voluntarily even though he was not informed that he would have to register as a sex offender. *Nollette,* 46 P.3d at 89. The *Nollette* court stated that:

> the totality of the circumstances must demonstrate that a defendant pleaded guilty with knowledge of the direct consequences of his plea. Direct consequences are those ramifications that have "'a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" Collateral consequences, by contrast, do not affect the

> length or nature of the punishment and are generally dependent on either the court's discretion, the defendant's future conduct, or the discretion of a government agency. Because collateral consequences of a criminal conviction are often limitless, unforeseeable or personal to the defendant, requiring an advisement with respect to every conceivable collateral consequence "would impose upon the trial court an impossible, unwarranted and unnecessary burden."

Id. (footnotes omitted). The court then held:

> A majority of jurisdictions that have considered the issue hold that sex offender registration is a collateral consequence of a guilty plea. Most of these holdings are based on the conclusion that registration requirements are not punitive, but instead serve a regulatory or remedial purpose. We agree with the majority of jurisdictions and hold that sex offender registration is a collateral consequence of a guilty plea because it is not a penal consequence.

Id. at 89-90 (footnotes omitted). The court concluded:

> Nevada's sex offender registration and notification requirement is a collateral consequence of a guilty plea because it is not sufficiently punitive to have an immediate and direct effect on the defendant's range of punishment. Because notification and advisement of a collateral consequence of a criminal conviction is not a prerequisite to the entry of a constitutionally valid plea, we

> conclude that the district court's failure to advise Nollette of the registration requirement before accepting his guilty plea does not render it constitutionally infirm.

Id. at 91.

¶9. This Court has previously delineated the difference between collateral and punitive consequences of a guilty plea:

> It is still incumbent on a trial judge to ascertain that the defendant knew the possible penalties which might be imposed for the charged offense to which the plea was made and there is no contention that this was not done. Therefore, a plea's possible enhancing effect on a subsequent sentence is merely *a collateral consequence of the conviction; it is not the type of consequence about which a defendant must be advised before the defendant enters the plea.*

Quinn v. State, 739 So. 2d 419, 421 (¶12) (Miss. Ct. App. 1999) (emphasis added).

¶10. Mississippi Code Annotated section 45-33-39(1) (Rev. 2004) provides:

> The court shall provide written notification to any defendant charged with a sex offense as defined by this chapter of the registration requirements of Sections 45-33-25 and 45-33-31. Such notice shall be included on any guilty plea forms and judgment and sentence forms provided to the defendant. The court

> shall obtain a written acknowledgment of receipt on each occasion.

This statute does not supplement the requirements for a guilty plea to be knowing, intelligent, and voluntary, which are found in Uniform Rule of Circuit and County Court 8.04(3) and (4). Section 45-33-39(1) merely requires that various authorities inform criminal defendants of their post-release obligations to society.[2] Certainly, it would be helpful if trial courts and the assistant district attorneys mentioned this post-release requirement in their guilty plea forms. Here, the sentencing order did in fact include notice of Magyar's obligation to register as a sex offender. We find this to be sufficient under section 45-33-39(1).

¶11. We find that the fact that Magyar must register as a sex offender is merely a collateral consequence of his guilty plea. We find that this issue is without merit.

B. Right to Confront Witnesses

¶12. Next, Magyar argues that his plea was not given knowingly, intelligently, and voluntarily

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[2] The Mississippi Code contains many other examples of collateral consequences: Mississippi Code Annotated section 73-3-41 (Supp. 2006) allows for automatic disbarment of an attorney who commits certain felonies; Mississippi Code Annotated section 97-37-5 (Supp. 2007) bans convicted felons from possessing certain weapons; and Mississippi Code Annotated section 97-35-27 (Rev. 2006) requires convicted felons to register with local law enforcement when they move to a new town.

because his attorney misinformed him regarding his right to confront witnesses. He claims that his public defender told him that videotaped testimony from the victim would be entered into evidence and that "it did not matter that the complaining witness would not [testify at trial]. . . ."

¶13. In order for a plea to be considered voluntary, knowing, and intelligent, a defendant must be told that he or she is waiving is "his/her constitutional . . . right to confront and cross-examine adverse witnesses. . . . " URCCC 8.04(A)(4)(c). During Magyar's guilty plea, the trial court informed Magyar that "[a]t trial you would have the right to cross-examine all the witnesses who testify against you. You have the right to confrontation, which means they must testify in your presence where you can observe them as they testify. . . . Do you understand your rights?" Magyar responded, "[y]es sir." We have previously stated, "[e]ven if a defendant receives erroneous advice from defense counsel, any misunderstanding created by this advice may be corrected by the court during the voluntariness inquiry." *Thomas v. State,* 881 So. 2d 912, 917 (¶13) (Miss. Ct. App. 2004).

¶14. While Magyar may be correct that his attorney did not properly inform him of his right of confrontation, we find that the trial court adequately informed Magyar of this right before Magyar pleaded guilty. Therefore, there is no merit to Magyar's claim that his guilty plea was not given knowingly, intelligently, or voluntarily.

II. Was Magyar's counsel ineffective?

¶15. Magyar also argues that his attorney was ineffective because he: (1) did not advise Magyar that he would have to register as a sex offender, (2) did not conduct a proper investigation, and (3) told Magyar that he would only receive a suspended sentence. To prove ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The burden of proof rests with the defendant to demonstrate both prongs. *McQuarter v. State,* 574 So. 2d 685, 687 (Miss. 1990).

¶16. In the context of a guilty plea, "[t]he defendant claiming ineffective assistance of counsel must show, by a preponderance of the evidence, that there is a reasonable probability that had counsel's assistance been effective, he would not have pled guilty, but would have insisted on going to trial." *Pleas v. State,* 766 So. 2d 41, 43 (¶7) (Miss. Ct. App. 2000). Under *Strickland,* there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. Magyar must allege both prongs of *Strickland* with specificity and detail. *Brooks v. State,* 573 So. 2d 1350, 1354 (Miss. 1990).

¶17. Magyar attached four affidavits to his motion for post-conviction collateral relief. Magyar's first affidavit was his own. Magyar's affidavit reinforced the allegations that he makes in his brief and

made in his motion. The second affidavit is that of a former prosecutor, Tommy Mayfield. Mayfield's affidavit was an expert opinion, based solely on the record, that Magyar's trial counsel was ineffective. The third affidavit is that of Magyar's public defender, Matthew Eichenberger; however, it is not attested. The final affidavit was given by Magyar's father, John C. Magyar. In this affidavit, Magyar's father stated that the Washington County Public Defender advised him after his son was sentenced that "the Washington County Public Defender's Office had not done an adequate job of representing . . . Magyar." We will now address the validity of two of the affidavits.

¶18. We will not consider Magyar's father's affidavit because it is hearsay. The Mississippi Supreme Court has held that it will not consider hearsay affidavits attached to a motion for post-conviction collateral relief, because "Miss. Code Ann. § 99-39-9(1)(e) allows the petitioner to present affidavits *from witnesses who would testify at trial,* not hearsay statements. . . ." *Smith v. State,* 877 So. 2d 369, 380 (¶21) (Miss. 2004) (emphasis added).

¶19. This Court will not consider Eichenberger's affidavit because it is unattested. Therefore, the Court cannot determine whether or not Eichenberger adopted the statements contained therein. The Mississippi Supreme Court has stated, "[a]n unsworn statement . . . is insufficient evidence to support [a petitioner's] allegation." *Wilcher v. State,* 863 So. 2d 719, 744 (¶80) (Miss. 2003).

¶20. Therefore, we will only consider Magyar's affidavit, Mayfield's affidavit, and the court records that Magyar attached as exhibits to his motion.

A. Requirement to Register As a Sex Offender

¶21. Magyar cannot show that his counsel was ineffective because he did not tell Magyar that Magyar had to register as a sex offender. As discussed above, Mississippi law does not require that Magyar be informed that he has to register as a sex offender for his guilty plea to be knowing, intelligent, and voluntary. Indeed, Magyar's sentencing order was sufficient to comply with section 45-33-39(1). Furthermore, Magyar has failed to specifically state how knowing that he had to register as a sex offender would have made him decide to go to trial, which is required under our holding in *Pleas,* 766 So. 2d at 43 (¶7).

B. Suspended Sentence

¶22. Magyar argues that his attorney encouraged him to enter a guilty plea because he told Magyar that Magyar would only receive a suspended sentence. Magyar's argument is contradicted by Magyar's testimony that he understood that the trial judge could sentence him to a maximum term of thirty years in prison. Magyar stated that he was not pleading guilty because someone threatened him or promised him anything. Magyar also stated that it was his decision to enter a plea of guilty, and all of

this testimony was reinforced by the language in the plea petition. As stated above, "[e]ven if a defendant receives erroneous advice from defense counsel, any misunderstanding created by this advice may be corrected by the court during the voluntariness inquiry." *Thomas,* 881 So. 2d at 917 (¶13). Magyar testified under oath during his guilty plea hearing that he was satisfied with his attorney's representation. We find no merit to this issue.

C. Failure to Investigate

¶23. Magyar's final claim for ineffective assistance of counsel is that his attorney should have investigated and subpoenaed certain unidentified impeachment witnesses. In his affidavit, Magyar asserts that his attorney failed to investigate the victim's credibility, which could have been impeached. In a motion for continuance, Magyar's attorney argued that he had "only recently learned of additional information as to potential past false allegations made by the alleged victim in this matter. As a result of this new information, . . . a Subpoena has been issued for employment records and documents of the business of the alleged victim's family." Magyar states that this motion was never brought for a hearing because his attorney advised him that pretrial motions would make the judge angry.

¶24. Mississippi Code Annotated section 99-39-9(1)(e) (Rev. 2007) requires:

> A specific statement of the facts which are not within the prisoner's personal knowledge. *The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained.* This showing shall state what the prisoner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

(Emphasis added). In the present case, Magyar attached four affidavits to his initial motion. This Court, as mentioned above, will not consider the affidavits of Magyar's father and the public defender. In his brief, Magyar argues that he told his attorney about "two potential witnesses which could bring the credibility of the prosecutrix into question. Counsel interviewed only one of those witnesses and made no reasonable effort to locate others." He also argues that he would have gone to trial and prevailed if his attorney would have "made an effort to procure the attendance of those witnesses at trial. . . ."

¶25. We find that Magyar has not fulfilled the requirements of section 99-39-9(1)(e). Magyar has

included an exhibit which lists facts that are not within his personal knowledge. In this document, Magyar states that facts not within his knowledge will be proven by "documents in the Court file, the District Attorney's file, the file of the investigating agency, files of the Washington County Public Defender and testimony from my parents and past and present personnel of the Washington County Public Defender's Office. . . ." Magyar, however, has not attached any proper affidavits from any of these purported witnesses. Furthermore, Magyar has not specifically told this Court what facts each witness will provide or specifically shown this Court in detail why proper affidavits were not supplied.

¶26. In *Robinson v. State,* 809 So. 2d 734, 736 (¶¶ 7-10) (Miss. Ct. App. 2002), we denied a motion for post-conviction relief because the petitioner did not follow the mandates of section 99-39-9(1)(e) and because the petitioner's motion lacked specificity. In *Robinson,* the petitioner "list[ed] a number of potential witnesses but fail[ed] to set out any factual details concerning what the nature of their testimony would have been or to support such factual details with affidavits from the potential witnesses." *Id.* at (¶9). In this case, Magyar neither listed these possible impeachment witnesses in his motion, nor did he provide any affidavits. Therefore, this Court has no idea if these alleged impeachment witnesses exist and what their testimonies would be.

¶27. The supreme court has stated:

> [The petitioner] failed to allege with the "specificity and detail" required that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Put another way, the petitioner's showing was not in proper form. The facts he alleged in his proposed motion and the brief submitted in support thereof were not supported by any affidavits other than his own.

Brooks, 573 So. 2d at 1354 (citation omitted). Magyar provided this Court with his own affidavit, Mayfield's affidavit, and some documents from his criminal file. Magyar's affidavit, however, is substantially impeached by Magyar's statements at the plea hearing where he said that he was satisfied with his attorney's performance. *Robinson,* 809 So. 2d at 736 (¶10). Furthermore, Mayfield's affidavit only stated that he was informed that there was potential exculpatory evidence available if the public defender would have conducted a proper investigation. Mayfield, however, does not specifically describe what this evidence is or the source of this evidence. Thus, Mayfield's affidavit does not satisfy the specificity requirement found in *Brooks.* Therefore, we find no merit to this issue.

III. Does Magyar's motion merit an evidentiary hearing?

¶28. Finally, Magyar argues that he is entitled to an evidentiary hearing. We find Magyar is not entitled to an evidentiary hearing. Mississippi Code Annotated section 99-39-11(2) provides that "[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified." Furthermore, we have held:

> A trial court has considerable discretion in determining whether to grant an evidentiary hearing. Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilt.

Hebert v. State, 864 So. 2d 1041, 1045 (¶11) (Miss. Ct. App. 2004) (internal citations omitted). We find that the trial court did not err in denying Magyar's motion for post-conviction collateral relief without an evidentiary hearing in this case because Magyar's assertions are substantially contradicted by the court record. Thus, we find that this issue has no merit.

¶29. THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT DENYING THE MOTION FOR POST-CONVICTION COLLATERAL RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WASHINGTON COUNTY.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR. CHANDLER, J., NOT PARTICIPATING.

IN THE CIRCUIT COURT OF
WASHINGTON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. **CAUSE NO. 2005-102**

JOHN ANTHONY MAGYAR

SENTENCING ORDER

(Filed Aug. 22, 2005)

The above named defendant, **JOHN ANTHONY MAGYAR**, being present with his attorney on July 18, 2005, was permitted by the Court to enter a plea of GUILTY to the charge of **SEXUAL BATTERY**, which plea this Court accepted as being knowingly and voluntarily given.

IT IS, THEREFORE, ORDERED AND ADJUDGED that for the crime of **SEXUAL BATTERY**, the defendant, **JOHN ANTHONY MAGYAR**, shall be sentenced to serve a term of **twenty (20) years** in the custody of the Mississippi Department of Corrections, execution of last **ten (10) years** of said sentence to be suspended conditioned upon the defendant remaining on supervised probation under the direction of the Mississippi Department of Corrections for a period of **five (5) years** or until the Court in term time, or the Judge in Vacation, shall alter, extend, terminate of direct the enforcement of the above sentence.

IT IS, FURTHER, ORDERED AND ADJUDGED that the defendant shall pay court costs in the

amount of $284.00 and a bond fee in the amount of $100.00. Defendant shall pay all amounts owed within ninety (90) days of his release from custody.

IT IS, FURTHER, ORDERED AND ADJUDGED that the defendant shall have no contact with the victim in this case or the friends and acquaintances of the victim.

IT IS, FURTHER, ORDERED AND ADJUDGED that the defendant shall register as a sexual offender.

IT IS, FURTHER, ORDERED AND ADJUDGED that the defendant shall be transported forthwith to the custody of the Mississippi Department of Corrections.

SO ORDERED AND ADJUDGED this the 22nd day of August, 2005.

/s/ [Illegible]
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

V. NO. 2005-102

JOHN ANTHONY MAGYAR

(Filed Jul. 9, 2007)

= =

TRANSCRIPT OF THE JULY 18, 2005, CHANGE OF PLEA AND THE AUGUST 22, 2005, SENTENCING BY THE COURT IN THE ABOVE-STYLED AND -NUMBERED CAUSE, BEFORE THE HONORABLE ASHLEY HINES, CIRCUIT JUDGE.

= =

APPEARANCES:

Present and Representing the State:

HONORABLE CAROL WHITE-RICHARD
Assistant District Attorney
P.O. Box 426
Greenville, Mississippi 38702-0426

Present and Representing the Defendant:

HONORABLE MATTHEW EICHELBERGER
HONORABLE WILLIAM LABARRE
Attorney at Law
P.O. Box 273
Greenville, Mississippi 38702

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[2.] CHANGE OF PLEA – JULY 18, 2005

THE COURT: 2005-102, John Anthony Magyar

(THE DEFENDANT APPROACHED THE BENCH WITH HIS ATTORNEY.)

THE CLERK: Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: I do.

EXAMINATION BY THE COURT:

Q. You are John Anthony Magyar?

A. Yes, sir.

Q. And you are thirty years of age?

A. Yes, sir.

Q. And you have – you have a college degree; is that correct?

A. Yes, sir.

Q. I take it you're able to read and write.

A. Yes, sir.

Q. And you're in Court today with your attorney, Mr. Eichelberger; is that correct?

A. Yes, sir.

Q. You have presented to the Court a petition to enter a plea of guilty to one count of sexual battery; is that correct?

A. Yes, sir.

Q. And have you read this petition?

A. Yes, sir.

Q. Have you gone over it with your lawyer?

A. Yes, sir.

[3.] Q. Has he explained everything in the petition to you?

A. Yes, sir.

Q. You understand everything in the petition?

A. Yes, sir.

Before we go any further, I'm going to advise you of certain rights that you have under the laws of this state and the United States. In the first place, you have the right to a speedy public trial by a jury. At that trial you would have the right to cross-examine all the witnesses who testify against you. You have the right of confrontation, which means they must testify in your presence where you can observe them as they testify; that is, the witnesses. You have the right to issue subpoenas to compel the attendance of witnesses or the production of any other evidence. Do you know what a subpoena is?

A. Yes, sir.

Q. You have the right to be represented by a lawyer at every critical stage of the proceedings against you. The law presumes that you are innocence. This requires the State to prove beyond a reasonable doubt that you are guilty. You have the right to testify or the right not to testify. Your lawyer can advise you as to what he thinks you should do with regard to the testimony, but in the end, you are the one who chooses whether you will testify or not. If you decide not to testify, then I would instruct the jury that they could draw no inference of guilt by the fact that you did not testify in your own case. If you did go to trial and, you were convicted, you would have the right to appeal your case [4.] to the Mississippi Supreme Court. By entering a guilty plea to this charge, you are waiving or giving up all of the rights that I've just explained to you. Do you understand your rights?

A. Yes, sir.

Q. Do you understand that you are giving up the rights by entering the plea of guilty?

A. Yes, sir.

Q. And you understand that you are charged with the crime of sexual battery –

A. Yes, sir.

Q. – that this carries a maximum penalty of 30 years in the penitentiary and there is no minimum. Do you understand that?

A. Yes, sir.

Q. And have you and your lawyer discussed all of the facts of the case?

A. Yes, sir.

Q. Has he explained to you and do you fully understand the nature of the charges against you?

A. Yes, sir, I do.

Q. And have you and your lawyer talked about the manner in which you would proceed if you did go to trial?

A. Yes, sir.

Q. You've talked about your trial strategy?

A. Yes, sir.

Q. Have you talked about what it is that the State has to prove in a case of this nature to get a conviction?

A. Yes, sir.

[5.] Q. Have you talked about what evidence they have that you think they will try to introduce to prove the facts necessary for a conviction?

A. Yes, sir.

Q. And have you talked about the response, if any, that you would make to that evidence as it was presented in court?

A. Yes, sir.

Q. Have you talked about what the outcome of the trial would likely be?

A. Yes, sir.

Q. And are you satisfied with the assistance that the lawyer has given you?

A. Yes, sir.

Q. And after talking with the lawyer, is it your own decision to enter the plea of guilty?

A. Yes, sir.

Q. Has anyone offered you anything of value as an inducement to plead guilty?

A. No, sir.

Q. Has anyone threatened you to coerce you to plead guilty?

A. No, sir.

Q. Are you presently under the influence of drugs or alcohol?

A. No, sir.

Q. Are you presently undergoing treatment for any type of mental condition or disorder?

A. No, sir.

[6.] Q. And do you understand that you are making an open plea, so I will conduct a sentencing hearing at a future date at which I will make a decision as to what I think is an appropriate sentence in this case, that I am not bound by anything anybody has told you.

A. Yes, sir.

Q. If I thought it was appropriate in your case to sentence you to serve 30 years in the penitentiary, that's within my discretion. Do you understand that?

A. Yes, sir.

Q. And do you understand that for a crime of this nature, any time that you do receive in the penitentiary will be served day for day. There is no parole for this crime. Do you understand that?

A. Yes, sir.

THE COURT: All right, and who is handling this on behalf of the State?

MS. WHITE-RICHARD: I am, Your Honor.

THE COURT: Ms. White-Richard, what facts would the State show in the event of a trial?

MS. WHITE-RICHARD: The State's case would show in Cause No. 2005-102 that this defendant, John Anthony Magyar, between the 17th day of November, 2004, and the 5th day of January, 2005, did here in Washington County unlawfully, willfully, feloniously engage in sexual penetration with [Name Of Minor Child Omitted], a child under the age of 18, at a time when the said John Anthony Magyar was in the position of trust [7.] or authority over the said [Name Of Minor Child Omitted], against the peace and dignity of the State of Mississippi.

EXAMINATION BY THE COURT:

Q. And do you accept those facts as true?

A. Yes, sir.

Q. And as to this charge of sexual battery, how do you plead? Guilty or not guilty?

A. Guilty.

Q. The Court accepts your plea of guilty and finds that it is knowingly, willingly, and voluntarily entered into.

THE COURT: And what do you say with respect to sentencing, Mr. Eichelberger?

MR. EICHELBERGER: Your Honor, we request a presentence investigation, and as soon as that's completed, we will be ready to proceed with the sentencing hearing.

THE COURT: All right, I'm going to continue the matter for sentencing, and I'm going to order a presentence investigation. The M.D.O.C. people are out, so it will be – that won't be possible to take that until next week. The court administrator will notify you – both of you as to a sentencing date.

MR. EICHELBERGER: Thank you, Your Honor.

* * *

AUGUST 22, 2005

THE COURT: 2005-102, John Anthony Magyar.

[8.] (THE DEFENDANT APPROACHED THE BENCH WITH HIS ATTORNEY, MR. LABARRE.)

***EXAMINATON BY THE COURT*:**

Q. You are John Anthony Magyar?

A. Yes, sir.

Q. Mr. Magyar, on July 18th I accepted your plea of guilty to one count of sexual battery, and I continued sentencing to this date. Do you have

anything to say for yourself prior the imposition of sentence?

A. No, sir, just want to express my sincere regret for the situation, sir.

Q. Very well.

THE COURT: And, Mr. Labarre, do you have anything?

MR. LABARRE: Your Honor, I did notice just – I wanted to bring to the Court's attention that the parent – dates of birth of his parents would have them some 85 years old, but they're not that old. Apparently there's a typographical error. He was not aware of their year of birth, I believe.

THE COURT: Where are you?

MR. LABARRE: On page 6. I think they're in their 50s.

THE DEFENDANT: Yes, sir. Fifty and fifty-two or something like that.

MR. LABARRE: That was the only thing that I saw in the PSI that appeared to be incorrect. Your Honor, the Court I know has reviewed his [9.] PSI. And this young man is well educated. He's been in the military. I believe in the marines, if I'm not mistaken.

THE DEFENDANT: Yes, sir.

MR. LABARRE: As the Court is aware from his PSI – and I would just reiterate what he stated as far as I know that he regrets this incident, and I don't really know what else to tell the Court as far as this case is concerned.

THE COURT: Very well, Ms. White-Richard, did you have anything to offer to the Court?

MS. WHITE-RICHARD: Yes, Your Honor. The victim's mother, Ms. McClain, is here and she'd like to be heard.

THE COURT: Very well. Step forward.

MS. McCLAIN: I'm [Name Of Minor Child Omitted] mother, Your Honor.

THE COURT: Yes, ma'am.

MS. McCLAIN: I appreciate the opportunity to speak. And I wanted you to see my daughter, the victim. Is there any way I can get this to you.

(DOCUMENT WAS HANDED TO THE COURT.)

THE COURT: Yes, ma'am.

MS. McCLAIN: She's my only child, and it was 18 years before I could have a baby, and, you know, new – I think I done a good job being a mother. She's a well-respected little girl. I've raised her in my business. And, you know, [10.] I taught her what to look for in life, what, you know, who to trust and who not to trust. Never once that I thought when I dropped her to school when she was 14 years old that

the person that was there to educate her was a person that I couldn't trust. A sexual predator. He gained my child's confidence in him. He brought her breakfast, left flowers in her locker. Over her Christmas holidays called her 201 times on her cell phone. He stalked her out. He gained her confidence. He took advantage of her mind until he could take advantage of everything else. He also told her – I mean, he knew what he was doing was wrong. Nobody can find out about this until you're 18. We've got to keep this quiet. So he knew exactly what he was doing. He's also got her convinced he's going to marry her one day. He bought her a pet for Christmas. It was their child. My child was – it was two places she could spend the night with two of her friends. He convinced this friend to bring her down a dirt road and drop her off in the middle of the night, but the friend had to drive off so he wouldn't be seen. I mean, this is smart. Yeah, he's educated, but he's also criminally smart. I don't want this to happen to nobody else's child. She's got psychological scars. She's seeing a therapist. We all are. She don't trust like she used to. It's caused [11.] problems with all of us within the house. She's seeing Madeline Smith. She's a psychologist in Greenwood. I had to take her out of this town. She's gone through kids, you know, rejecting her, talking slander. You just ridiculed in town. I've got her back in school this year, I had to take her out and home school her to finish last year because of her withdrawals in her mind. I'm sorry. I'm trying to hold it together. But this – I don't want any parent to have to go through what we've gone

through. Yes, he's educated and he looks good, but within him's a monster. Kids trust him. Ever since he was arrested, he was told not to contact my daughter, but he's contacted her through her friends. Every message that he's wanted to get to her he's got to her by using her friends because teenage children trust him. He has a way to gain their trust. When he was sentenced or pled guilty, I told my child after the fact. She already knew it. She said, "Mama, he'd already told me." He was told not to contact my daughter. I don't know how to stop him. I ask the Court to put him away. Give him time to think, to make an example that no other parent has to go through this. It's horrible. It's horrible that you can't trust your teachers. Who can you trust? I just ask you to take all this into consideration, Your Honor, that he [12.] needs to be taken off the street. And if there's any way that he can stop contacting her friends, he needs to do so, because she knows everything, every move. Thank you.

THE COURT: Mr. Labarre.

MR. LABARRE: May I have just a moment.

(BRIEF PAUSE IN THE PROCEEDINGS.)

THE COURT: Do we have anything else, Mr. Labarre?

MR. LABARRE: Judge, just – I think the Court is aware somewhat of the facts in this case, and – very aware of the facts in this case. And as far as – I wanted to ask him – that's why I asked to step away

a moment – if he had, in fact, any contact with this child, and he says he has not. He has had contact with people at the school, people that he knows at the school. Not the kids but teachers, people like that, and I'm assuming that's how they found out. I don't know. But people talk. But as far as, again, the facts of the case, Judge, I think the Court's aware of those.

THE COURT: All right. This is a very serious crime, you know. I think you just have to take into account the fact that the young people in a vulnerable situation have to be protected from this type of behavior, and I'm going to give you some credit for the fact that you did enter a guilty plea. And it's the [13.] judgment of the Court that you be sentenced to serve a term of 20 years, that 10 of those years will be suspended, so you will serve 10 years in the custody of the Department of Corrections without reduction, and I'm going to order that you have no contact with anybody here in Washington County that are acquaintances or friends of any of the people involved in this case. If you do, I'm going to knock you back to the other 10. And you have to register as a sex offender as well. And I think Mr. Labarre can facilitate that process, can't you?

MR. LABARRE: I believe that's done through the sheriff's office, if I'm not mistaken.

THE COURT: It is? All right. And I'm going to also order that you pay court costs of $284 and a bond fee of $100. And the defendant is remanded to

custody. And, Mr. Labarre, that 10 years is on supervised probation.

MR. LABARRE: Yes, sir.

THE COURT: Suspended with five years supervised probation.

END OF TRANSCRIPT.

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
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October 22, 2009

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 22nd day of October, 2009.

Supreme Court Case # 2007-CT-00740-SCT
Trial Court Case # CI2007-39

John Anthony Magyar v. State of Mississippi

Motion for rehearing filed by appellant is denied. Chandler, J., not participating.

* NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE CIRCUIT COURT OF
WASHINGTON COUNTY, MISSISSIPPI

JOHN ANTHONY MAGYAR	PETITIONER
VS.	CAUSE NO.
STATE OF MISSISSIPPI	C12007-39
	RESPONDENT

MOTION FOR POST CONVICTION RELIEF

(Received & Filed Feb. 12, 2007)

Comes now John Anthony Magyar, a prisoner in custody under sentence this Court, by and through counsel and files this his Motion to set aside his plea of guilty and sentence rendered thereon and in support thereof would show unto the Court the following, to wit:

I.

This Court has jurisdiction over the parties and subject matter of this petition. The petitioner is currently incarcerated in the Mississippi Department of Corrections, pursuant to this Court's order. This Motion is filed pursuant to Title 99, Chapter 39 of the Mississippi Code, Mississippi Uniform Post Conviction Collateral Relief Act, Section 99-39-1 (1972) as amended, et. seq.

II.

Petitioner, John Anthony Magyar, was indicted in the Circuit Court of Washington County, Mississippi for the crime of sexual battery, a copy of said indictment being filed in this Court and is contained in this Court's file, Cause No. 2005-102; a copy is also attached hereto and incorporated herein as **exhibit "a"**.

III.

On the 18th day of July, 2005, John Anthony Magyar entered a plea of guilty to the said charge, the original Petition to Enter Guilty Plea being contained in this Court's criminal file associated with this petition and a copy thereof is attached hereto and incorporated herein as **exhibit "b"**. John Anthony Magyar was sentenced by the Circuit Court of Washington County, Mississippi, on the 22nd day of August, 2005, in cause number 2005-102, to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections ("MDOC") with ten (10) of those years being suspended, followed by five (5) years supervised probation. A true and correct copy of the transcript of such proceedings (guilty plea and sentencing) and sentencing order is attached hereto and incorporated herein as **exhibit "c"**.

IV.

Petitioner's plea of guilty was not freely, voluntarily and intelligently made. Thus, his plea was accepted and he was adjudicated to be guilty and he was later sentenced, in violation of his State and Federal Constitutional rights, including, but not limited to, those rights contained in the 5th and 6th Amendments to the United States Constitution and the laws of the State of Mississippi.

V.

There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction, in the interest of justice. If this petition is granted, the defendant has defenses available, that will likely lead to his acquittal.

VI.

The defendant/petitioner will be able to show that the credibility of the complaining "victim" in the criminal case was not properly investigated. Petitioner's legal counsel, prior to the defendant's guilty plea, was informed of two potential witnesses which could bring the credibility of the prosecutrix into question. Counsel interviewed only one of those witnesses and made no reasonable effort to locate others. Had counsel made an effort to procure the attendance of those witnesses at trial, and locate others, the petitioner would not have entered a plea of guilty and would have prevailed at trial.

VII.

On the 27th day of June, 2005, plea counsel made his initial discovery request from the State of Mississippi (see attached **exhibit "d"** incorporated herein.) At that time, trial on a charge carrying up to thirty years imprisonment, was sixteen (16) business days away. No trial subpoenas were issued by the defense.

Very shortly prior to trial however, plea counsel made a "last ditch" show of effort to locate a critical impeachment witness, whom the defendant had long prior advised him of. However, counsel's effort was too little, to late. Counsel caused a DEFENSE WITNESS SUBPOENA stamped **"RUSH"** to be served on Lydia McCain, mother of the prosecutrix, on the 6th day of July, 2005, eight (8) business days prior to the July 19 trial date, requiring her to produce three and one half years of employee records to the office of the Public Defender by the 15th day of July, 2005, 8:30 a.m.. Said subpoena thus gave Mrs. McCain only six (6) business days to comply (see attached **exhibit "e"** incorporated herein). Knowing that he had not issued the subpoena in a timely fashion, counsel also filed a MOTION TO CONTINUE. (See attached **exhibit "f"** incorporated herein) in an effort to cover his mistake. The State of Mississippi, on the 12th day of July, 2005, correctly responded with a MOTION TO QUASH SUBPOENA due to counsel's ineffective failure to comply with Rule 2.01 of the Uniform Circuit and County Court Rules regarding the timely issuance and service of

subpoenas (see attached **exhibit "g"** incorporated herein).

To the best of petitioner's knowledge, the records demanded by the subpoena were never produced and the motion to continue was never brought forth for hearing. The critical defense witness was never located. Instead, the petitioner was told by counsel on the day before trial to "go ahead and get it over with and move on with your life" or it would be ugly the next day at trial. The petitioner plead guilty. A month later at sentencing, petitioner learned that counsel had moved to Texas.

The petitioner did not receive effective assistance of counsel and he was thus, denied his right to effective assistance of counsel as guaranteed him by the Sixth Amendment to the United States Constitution, Counsel's performance was deficient and such deficiency deprived the petitioner of his Constitutionally guaranteed right to counsel and fair proceedings.

VIII.

In all paragraphs here following, the petitioner incorporates those items and allegations stated in paragraphs one through seven above and in further support thereof, submits that:

The public defender assigned to defending the petitioner, Matthew Eichelberger ("counsel" hereinafter), did very little to defend the petitioner. Counsel

failed to conduct an adequate investigation, failed to interview potential witnesses provided to him by the petitioner and failed to request of the Court funds to hire an investigator much needed to track down and interview witnesses. Upon information and belief, the Washington County Public Defender's office was without an investigator during the time counsel was representing the petitioner, due to the investigator regularly on staff having been deployed to active military duty.

IX.

Counsel failed to advise the petitioner that upon conviction of sexual battery that he, the petitioner, would be required to register as a sex offender for the remainder of his life. If the petitioner had been advised by his counsel, or the Court, of the requirement of sex offender registration, he would not have entered a plea of guilty. Counsel had advised petitioner that to enter a plea of guilty would be to "get it over with" and allow him to "get on with his life." To be subject to the onerous burden of lifetime sex offender registration would hardly be "getting it over with".

X.

Had the petitioner's legal counsel conducted an adequate investigation, his counsel and the petitioner would have discovered that evidence existed which casts doubt upon the credibility of the prosecutrix.

The testimony of the prosecutrix would have been the only potential evidence of guilt against the defendant and with her credibility being substantially impeached by such evidence, the petitioner would not have entered a plea of guilty and there is a reasonable probability that he would have been found not guilty at trial.

XI.

During the entire representation, counsel had conference with the petitioner no more than three (3) times, spending not more than one (1) aggregate hour with him. The petitioner was never shown any discovery provided to counsel by the State. It is believed by petitioner that counsel never viewed the video tape of the alleged victim describing the alleged crime. Counsel only read portions of the discovery to petitioner, telling the petitioner nothing more than "it looked bad".

XII.

Further, counsel erroneously advised the petitioner that if the purported victim at issue chose not to testify at trial, then the State of Mississippi could introduce into evidence the extrajudicial prior accusatory statements made by her to her investigator/ counselors, which would lead to his conviction. Such legal advice was clearly erroneous, due to the general prohibition against hearsay evidence and the right of confrontation as guaranteed by the 6th Amendment

to the United States Constitution. *See* ***Crawford v. Washington***, *541 U.S. 36 (2004).*

XIII.

Petitioner's counsel failed to adequately explain to him his constitutional rights and the ramifications of waiving those rights. The guilty plea petition which the petitioner was to sign was shown to him, for the first time, by counsel on the day the guilty plea was entered. The circumstances surrounding the petitioner on the day of the entry of the plea were that he had been told by counsel to appear in court on a certain day, July 18, 2005. When the petitioner appeared in Court, he was handed the plea petition and told to look over it while counsel went to confer with another client and while the alleged victim's mother was sitting nearby observing. That morning's "looking over the petition" was the extent of counsel's explanation to petitioner of petitioner's constitutional and statutory rights, which he would shortly be waiving. Petitioner had been told by counsel that if he did not sign the petition and plea guilty, that trial would be had the next day, that he would be convicted and severely punished. Petitioner believed counsel's statement that trial would be had the next day if he did not immediately plea guilty, and knowing that counsel had not caused to be issued any subpoena to compel the attendance of any witness at trial, to testify on the petitioner's behalf, nor had a single pretrial motion been brought to hearing by counsel, and coupled with certain erroneous advice given to him by

his counsel, petitioner elected to enter his plea of guilty in order to avoid the "slaughter" he was most assuredly being led into.

XIV.

Prior to the guilty plea, counsel had advised petitioner that to bring any pre-trial motions to hearing would "make the judge mad", thus no motion should be brought to hearing. Further, counsel erroneously advised petitioner that hearsay accusatory statements of the alleged victim, by way of previously recorded video tape, could be admitted into evidence against him, if the victim chose not to testify. Further, immediately prior to entering his plea, counsel had advised petitioner that if he entered an "open plea", one without a recommendation from the prosecution, that the petitioner would most likely receive an entirely suspended sentence and that he, the petitioner, could "go on with his life" and "get this thing over with". Petitioner would not have entered a plea of guilty had he not been advised by his lawyer that he would most likely receive an entirely suspended sentence.

XV.

The guilty plea petition underlying the conviction is inadequate, incomplete and confusing on it's face. (See exhibit "b" incorporated herein). The minimum and maximum statutory penalties are not adequately described in the PETITION TO ENTER PLEA OF

GUILTY used by counsel. There is no clear statement in the petition regarding the maximum amount of incarceration in the Mississippi Department of Corrections that could be imposed by the Court. In an apparent effort to address that critical issue, the petition merely states: "MAXIMUM PENALTY: *30 Years*". Similarly, there is no meaningful explanation of the statutory penalty regarding the minimum amount of incarceration that could be imposed for the offense of sexual battery. In an effort to address that critical issue, the petition provides: "MINIMUM PENALTY: *N/A YEARS*". To the jurists and practitioners who deal with the criminal justice system and guilty pleas on a regular basis, a correct assumption regarding the meaning of the notations "MAXIMUM PENALTY: 30 YEARS" and "MINIMUM PENALTY: N/A YEARS" would probably be reached; but to the novice, in Court for the first time, attending his own guilty plea, we are left only to guess what he might conclude from such "shorthand" language, shown to him only minutes prior to his plea. Petitioner was advised by his counsel that "technically, he could get up to 30 years", but that the practical result from an open guilty plea would be an entirely suspended sentence. At plea, the Court advised the petitioner that "this carries a maximum penalty of 30 years in the penitentiary and there is no minimum." Thus, the petitioner was left to believe that if he went to trial and was found guilty[1] the Court would be left with no

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[1] A large probability in his mind due to counsel's lack of investigation, lack of preparation and erroneous advice given.

option but to impose the maximum sentence, there being "no minimum" penalty and the minimum penalty being: "N/A". The issue of minimum and maximum statutory fines was not addressed in any manner by the guilty plea petition or the Court.

XVI.

There is no record that the petitioner understood the elements of the offense to which he entered his plea of guilty. The elements of sexual battery are not recited in the plea petition, neither were they addressed in the plea colloquy with the Court, The factual basis, as stated by the Assistant District Attorney, was agreed to by the petitioner, but there is no record that he was ever told, or understood, whether or not the recited factual basis met any particular elements of a criminal offense. The Assistant District Attorney did allege that he did "engage in sexual penetration with . . . a child under the age of 18 at a time when the said John Anthony Magyar was in a position of trust or authority . . . ", but there was no explanation of the terms "sexual penetration" or "position of trust or authority". Counsel never explained the elements of sexual battery to the petitioner.

XVII.

A separate sworn statement of the specific facts which are within the personal knowledge of the petitioner is attached hereto and incorporated herein

as **exhibit "h"**. Other facts, which are not within the personal knowledge of the petitioner, are specifically listed in attached **exhibit "K"**, incorporated herein and will be proven by admissions of his prior legal counsel, by court records, by records from the Washington County Public Defender's office and by John Magyar, the defendant's father and Christie Magyar, the defendant's mother.

XVIII.

The affidavit of potential defense witness Tommy Mayfield, Esq. an experienced Mississippi criminal defense lawyer and former Assistant District Attorney, is attached hereto and incorporated herein as **exhibit "I"**. Mr. Mayfield's affidavit gives credible weight to the petitioner's argument of ineffective assistance of counsel.

XIX.

The petitioner was denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United State's Constitution.

XX.

Counsel's performance was deficient and fell below the range of competence demanded of attorneys in criminal cases. Petitioner was severely prejudiced by counsel's errors; but for counsel's individual and cumulative errors, the petitioner would not have

entered a plea of guilty and would have insisted on going to trial and would have had a reasonable chance of success at trial. The outcome of the prior proceedings in this cause (finding of guilt by guilty plea) was unreliable and, as described in the paragraphs preceding and documents attached hereto, and as will be shown upon a hearing granted by the Court, fundamentally unfair.

XXI.

As further evidence of counsel's deficiency, he has been very uncooperative with the undersigned counsel in my effort to defend the petitioner. Counsel has been evasive and has refused to return numerous telephone calls and correspondence. Before becoming completely uncooperative however, counsel did admit to the undersigned (by conversation and failing to strike or amend certain language in a proposed unsigned affidavit, while striking or amending, by hand, other language), that he was handling approximately 100 felony cases at the time of his representation of the petitioner; that the public defender's office did not have an investigator during the relevant times and he did not request funding for an investigator or expert witness; that counsel did not interview the prosecutrix or her mother, or any personnel from the Children's Advocacy Center (who had interviewed the prosecutrix); that counsel did have a sworn statement from a witness who could testify concerning the credibility of the prosecutrix, but no subpoena was issued to secure the attendance

of that witness at trial; that he did not interview the State's expert witness and that prior to the guilty plea, he did discuss with the petitioner, the possibility of the State using the video tape of the prosecutrix at trial; and that he does not recall advising the petitioner of sex offender registration requirements. (see **exhibits "J" and "J-1"** incorporated herein)

XXII.

After Sentencing, The Washington County Public Defender admitted to the petitioner's parents that his office did not do an adequate job defending the petitioner. See **attached exhibit "L"** incorporated herein.

XXIII.

The petitioner reserves the right to amend this petition prior to final disposition.

WHEREFORE, PREMISES CONSIDERED, Defendant/Petitioner prays that this Court will enter an order: 1) granting this petition to set aside the guilty plea without the necessity of further pleading or hearings; or, in the alternative, 2) allowing the petitioner to conduct certain discovery, including, but not limited to taking the deposition of previous defense counsel and thereafter 3) setting this petition for hearing that further proof may be presented to the Court and then 4) immediately after such hearing

enter an Order setting aside the guilty plea and sentence in this cause.

Respectfully Submitted, this the 7 Day of February, 2007.

/s/ James L. Kelly
John Anthony Magyar, by
James L. Kelly, his attorney

VERIFICATION

I, Anthony Magyar, petitioner herein, do hereby state, swear, affirm and verify that the averments and information contained in the forgoing Motion for Post Conviction Collateral Relief are true and accurate to the best of my knowledge and belief.

/s/ Anthony Magyar
Anthony Magyar

Sworn before me, Notary Public, this the 12 Day of January, 2007.

/s/ Carolyn McAdams
NOTARY PUBLIC

MY COMMISSION EXPIRES:

MISSISSIPPI STATEWIDE NOTARY PUBLIC
MY COMMISSION EXPIRES OCT 28, 2007
BONDED THRU STEGALI NOTARY SERVICE

EXHIBIT A

INDICTMENT SEXUAL BATTERY 97-3-95(2)

STATE OF MISSISSIPPI

NO. 2005-102

COUNTY OF WASHINGTON

In the Circuit Court of Washington County, at the April 2005 Term.

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful men and women of Washington County, duly elected, empanelled, sworn and charged at the April 2005 Term of the Circuit Court, to inquire in and for the body of Washington County, in the name and by the authority of the State of Mississippi, upon their oaths, present:

That **JOHN ANTHONY MAGYAR**, between the 17th day of November, 2004 and the 5th day of January, 2005, in Washington County, did unlawfully, willfully and feloniously engage in sexual penetration with [Name Of Minor Child Omitted], a child under the age of eighteen (18) at a time when the said John Anthony Magyar was in a position of trust or authority over the said [Name Of Minor Child Omitted]

against the peace and dignity of the State of Mississippi.

A TRUE BILL

/s/ [Illegible] Richard _____ /s/ _____
ASSISTANT DISTRICT ATTORNEY — FOREMAN OF THE GRAND JURY

Filed and recorded the _____ day of _____, 2005.

Circuit Clerk _____

EXHIBIT B

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI
VERSUS **CASE NO. 2005-102**
JOHN ANTHONY MAGYAR
DOB: 2-3-75

PETITION TO ENTER PLEA OF GUILTY

(Received and Filed Jul. 18, 2005)

NAME: JOHN ANTHONY MAGYAR

SOCIAL SECURITY NO.
[Social Security Number Omitted]

AGE: 30 **EDUCATION:** 15 Years

CHARGE: Sexual Battery

MAXIMUM PENALTY: 30 Years

MINIMUM PENALTY: N/A Years

PLEA OFFER: Open Plea fine, $300 attorney's fees, $250 CVCF, restitution if any and costs of court

PRIOR CONVICTIONS (list charge and date of each): None

I, *JOHN ANTHONY MAGYAR*, being mentally competent, and not being under the influence of any drugs or alcohol, do hereby request the Court to allow me to enter a plea of guilty to the above-mentioned charge. I have been indicted or have waived indictment and present myself on a Bill of Information and wish to enter a plea of guilty to the crime with which I have been charged.

The facts of the crime committed by me are as follows: Between the dates of November 17, 2004, and January 5, 2005, I, John Anthony Magyar committed sexual battery against [Name Of Minor Child Omitted], a child under the age of 18 years.

I understand the minimum and maximum sentence the Court can give me for this are listed above and that the Court is not bound by the recommendations of the district attorney, and that the Court could, if it saw fit, impose the maximum sentence for this crime.

Restitution in the amount of $_____ is owed to: _____.

No promises have been made to me regarding a lighter sentence, preferred treatment or anything of value to induce me to petition this Court to enter a

guilty plea. I have not been subjected to any duress, pressure, threat or coercion by any person to enter this petition.

I am satisfied with the services of my attorney, and believe my attorney has acted in my best interest in my case.

By pleading guilty to the charge(s) against me, I give up the following rights guaranteed to me by the Constitution of the United States of America and by the Constitution of the State of Mississippi:

(a) the right to a speedy and public trial by jury;

(b) the right to see, hear and face in open court all witnesses called to testify against me and the right to cross-examine those witnesses;

(c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor;

(d) the right to have the assistance of a lawyer at all stages of the proceedings;

(e) the presumption of innocence, i.e., the State must prove beyond a reasonable doubt that I am guilty;

(f) the right to testify, or not testify and thereby incriminate myself, at my sole option and, if I do not testify, the jury will be instructed that this should not be held against me; and

(g) the right to appeal the sentence given by the Court.

I present this petition of my own free will and accord and have executed same on this the 18th day of July, 2005.

/s/ John Magyar
DEFENDANT

AFFIDAVIT

The undersigned defendant states as follows: That the foregoing Petition to Enter Plea of Guilty was signed with the full knowledge of its contents and with the full knowledge that every person who shall willfully and corruptly swear, testify, or affirm falsely to any material matter under oath, affirmation, or declaration legally administered in any matter, cause, or proceeding in any court of law or equity shall upon conviction be punished by imprisonment in the penitentiary not exceeding ten (10) years.

/s/ John Magyar
DEFENDANT

AFFIDAVIT

PERSONALLY APPEARED before me, a notary public in and for the jurisdiction aforesaid, the undersigned attorney for the defendant herein, who being by me first duly sworn, states on oath as

follows: That he/she personally witnessed the signature of the above defendant after having fully explained the contents of this Petition to Enter Plea Guilty to said defendant.

/s/ [Illegible]
ATTORNEY AT LAW

SWORN TO AND SUBSCRIBED before me, this the 18th day of July, 2005.

/s/ Janice C. Brown
NOTARY PUBLIC

My Commission Expires: 12/03/08

EXHIBIT D

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI
VERSUS ***NO. 2005-102***
JOHN ANTHONY MAGYAR

MOTION

(Received and Filed Jul. 13, 2005)

The above defendant, through his/her attorney of record, does hereby formally demand full and complete discovery pursuant to the laws and statutes of the State of Mississippi and pursuant to Rule 9.04 of the Uniform Circuit and County Court Rules; and,

The above defendant does hereby demand a speedy trial pursuant to the laws and statutes of the State of Mississippi, and pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and pursuant to Article 3, Section 26 of the Mississippi Constitution.

The above defendant does, under the provisions of Rule 7 of the Mississippi Rules for Electronic and Photographic Coverage of Judicial proceedings, (MREPC), object to any and all media coverage specified by said rules.

Respectfully submitted this day, June 27, 2005.

WASHINGTON COUNTY
PUBLIC DEFENDER

BY: /s/ **William R. LaBarre**

CERTIFICATE OF SERVICE

I, the attorney of record herein, hereby certify that I have this day delivered a true and correct copy of the above Motion to the office of the District Attorney for the Fourth Judicial District in Greenville, Mississippi, on this day, June 27, 2005.

BY: /s/ **William R. LaBarre**

EXHIBIT E

**IN THE CIRCUIT COURT OF
WASHINGTON COUNTY, MISSISSIPPI**

RUSH

STATE OF MISSISSIPPI
VERSUS **NO. 2005-102**
JOHN ANTHONY MAGYAR
Court Date _____

DEFENSE WITNESS SUBPOENA

TO THE SHERIFF OF WASHINGTON COUNTY – GREETINGS:

You are hereby commanded to summon:

> **Lydia McCain to produce for purposes of inspection any and all records relating to the employment of all individuals employed on and after the dates of January 1, 2002, up until the present time, by The Seafood Place, Highway 1 South, Greenville, MS, said records to be made available to agents of the Washington County Public Defender's office on or before July 15, 2005, at 8:30 a.m.**

if to be found in your County, wherein the State of Mississippi is Plaintiff, and JOHN ANTHONY MAGYAR is Defendant, on the part of the Defense.

This you shall in no wise omit under the penalty prescribed by law. Herein fail not, and have you then and there this writ.

Given under my hand and seal of said Court, and issued this the 05 day of July, 2005.

JANICE C. BROWN,
CIRCUIT CLERK

BY: /s/ [Illegible]

EXHIBIT F

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI **CRIMINAL CASE**
VERSUS **NO.: 2005-102**
JOHN ANTHONY MAGYAR **DEFENDANT**

MOTION TO CONTINUE

(Received and Filed Jul. 8, 2005)

Comes now the defendant, by and through his attorney, and moves this Court to continue this matter until the next term of court, and in support of said Motion would show unto the Court the following:

1.

The Defendant has been indicted for the crime of Sexual Battery under 97-3-95(2) of the Mississippi Code of 1972 as annotated and amended. The Defendant

faces a maximum penalty of thirty (30) years in prison if adjudged guilty.

2.

In preparation and investigation of this matter, counsel for the defendant has filed with this Court a Motion to Offer Evidence of Alleged Victim's Past False Allegations in accordance with Rule 412(b)(2)(c) of the Mississippi Rules of Evidence.

3.

Counsel for the Defendant has also only recently learned of additional information as to potential past false allegations made by the alleged victim in this matter. As a result of this new information, and in order to fully investigate this matter, a Subpoena has been issued for employment records and documents of the business of the alleged victims family. Due to notice requirements applicable to said subpoena, this additional information may not be available for inspection by the Defendant until July 15, 2005, only two (2) business days prior to the scheduled trial of this matter.

4.

As this is the first setting of this case for trial, and as this new information must be fully investigated in order to insure a fair trial for all parties, the Defendant requests that this Court continue this

matter for trial until the next term of court to allow full and complete investigation.

Respectfully submitted, this the 8th day of July, 2005.

BY: /s/ William R. LaBarre
ATTORNEY FOR DEFENDANT

EXHIBIT G

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. **No. 2005-102**

JOHN ANTHONY MAGYAR

MOTION TO QUASH SUBPOENA

(Received and Filed Jul. 12, 2005)

Comes now the State of Mississippi by and through Carol L. White-Richard, Assistant District Attorney, and moves the Court for a Motion to Quash a Subpoena in the above-referenced cause and in support of said motion would show unto the Court as follows:

The defendant was indicted on a charge of Sexual Battery during the April, 2005 term of the Washington County Grand Jury.

The Sexual Battery charge arose out of incidents that occurred between the defendant while he was a teacher at Greenville Christian and [Name Of Minor Child Omitted], a fifteen year old who was the defendant's student.

On July 5, 2005, the defendant's attorney subpoenaed the employment records of Lydia Mclain, the mother of [Name Of Minor Child Omitted]. (Attached as exhibit "A").

The State requests that this subpoena be quashed as it does not comply with Rule 2.01 of the Uniform Circuit and County Court Rule.

The State respectfully requests that this matter be set for hearing and that after such a hearing, the court Quashes the subpoena issued in this case.

RESPECTFULLY SUBMITTED, this the 11th day of July, 2005.

/s/ Carol L. White-Richard
CAROL L. WHITE-RICHARD
ASSISTANT DISTRICT ATTORNEY

EXHIBIT H

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

BEFORE ME, NOTARY PUBLIC IN AND FOR THE JURISDICTION AFORESAID, DID COME

JOHN ANTHONY MAGYAR, WHO, UPON HIS OATH DID STATE, SWEAR OR AFFIRM THAT,

My name is John Anthony Magyar. I am currently in the custody of the Mississippi Department of Corrections serving a sentence imposed by the Washington County Circuit Court. I was indicted by the Grand Jury of Washington County, Mississippi for the crime of sexual battery. On the 18th day of July, 2005, I entered a plea of guilty to the said charge. I was later sentenced by the Circuit Court of Washington County, Mississippi, on the 22nd day of August, 2005, in cause number 2005-102, to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections ("MDOC") with ten (10) of those years being suspended, followed by five (5) years supervised probation.

My plea of guilty was not freely, voluntarily and intelligently made because of my legal counsel mis-informed me of the law, failed to advise me of important aspects of the law, failed to adequately investigate the case (he never advised me of any meaningful investigation he had conducted), failed to adequately communicate with me concerning the evidence against me and possible defenses, and led me to believe the entering a plea of guilty would result in me receiving an entirely suspended sentence. The prosecutrix is not a credible witness and could have been impeached by counsel if he had investigated her credibility. My lawyer made his initial discovery request to the State sixteen business days away from trial. He never showed the discovery

to me, which I presume had been supplied by the State of Mississippi to him. At the time of my plea, I was not aware of my subpoena he had issued to compel the attendance of any witness at trial. Instead, I was told by my lawyer, on the day before trial, to "go ahead and get it over with and move on with your life" or it would be really bad the next day at trial. He told me that I would not go to jail or prison after my plea.

A month later, at my sentencing, I learned that my public defender lawyer had moved to Texas. Another public defender lawyer stood in at my sentencing. That lawyer also left the Washington County public defender's office not long after my sentencing.

My lawyer did not, prior to plea, advise me that I would be required to register as a sex offender. Had he advised me of that prior to plea, I would not have entered a plea of guilty. I do not recall being advised of sex offender registration by the Court either. During the entire representation of me, my lawyer and I talked about my case for less than one (1) hour. At one time we talked about possibly filing a pre-trial motion, but my lawyer said not to do that because it would only make the judge mad.

My lawyer told me that the State had a tape of the minor prosecutrix stating that I had sex with her. He never showed the tape to me, and told me that if the the prosexutrix chose not to testify, that they could play the tape to the jury and I would be

convicted. After hearing that, and being told that I would be able to "go on with my life" if I plead guilty, I concluded that it would best for me to go ahead and plea guilty.

The guilty plea petition which I signed was shown to me, for the first time, on the day the guilty plea was entered. When I appeared in Court, on the day of my plea, I was handed the plea petition and told to look over it while my lawyer went to confer with another client and while the alleged victim's mother was sitting nearby observing. That morning's "looking over the petition" was the extent of my lawyer's explanation to me of my constitutional and statutory rights. I was told by my lawyer that if I did not sign the petition and plea guilty, that trial would be had the next day, and that I would be convicted and severely punished. I believed counsel's statement that trial would be had the next day if I did not immediately plea guilty, and knowing that counsel had not caused to be issued any subpoena to compel the attendance of any witness at trial, to testify on my behalf, nor had a single pre-trial motion been brought to hearing by counsel (to my knowledge), and being told by my lawyer that they could play the video tape of the prosecutix to the jury, I thought it best to plea guilty, considering that I was not expecting to be sentenced to prison. I had no idea about sex offender registration. Also, my lawyer never discussed with me the concept or element of being in a "position of trust or authority" over the

prosecutrix, or possible lesser included offenses of what I was charged with.

Considering all the circumstances, my guilty plea was not freely, voluntarily and intelligently made.

/s/ John Anthony Magyar

Sworn before me, this the 11 Day of January, 2007

/s/ Carolyn McAdams
NOTARY PUBLIC

EXHIBIT I

STATE OF MISSISSIPPI

COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, THOMAS R. MAYFIELD, who being first duly sworn, deposes and says:

1. I have been furnished certain materials for my examination in connection with that certain cause styled "State of Mississippi vs. John Anthony Magyar" and numbered 2005-102 in the Circuit Court of Washington County, Mississippi. These materials include, but are not limited to, the following:

A. Documents represented to me as having been provided to trial counsel by the State of Mississippi in response to a discovery request on or about June 27, 2005.

B. Transcripts of John Anthony Magyar's plea of guilty proceeding dated July 18, 2005 and his sentencing hearing dated August 22, 2005.

C. A Petition to Enter Plea of Guilty dated July 18, 2005 and executed by the defendant.

D. An Order dated August 22, 2005 sentencing the defendant.

E. Copies of correspondence for Magyar's present counsel, James L. Kelly, Esq. to trial counsel, Matthew Eichelberger, Esq. during the year 2006. These materials included the draft of an affidavit which was represented to me as having been edited and corrected by Mr. Eichelberger and approved by him as being true and correct.

F. A preliminary draft of the Motion for Post Conviction Relief filed herein.

2. I have been requested to render an opinion as to whether John Anthony Magyar received effective assistance of counsel in connection with his plea of guilty in this matter.

3. It is my opinion that Magyar did not receive effective assistance of counsel for at least the following reasons:

A. I am informed that the proof will show that trial counsel advised Petitioner/defendant, prior to his plea of guilty, that should the complaining witness, for whatever reason, not testify at trial, her statements given to detectives, etc. during the

investigative stage of the case would be admissible through the testimony of third persons and would likely result in his being convicted. This was erroneous advice. Magyar entered his plea of guilty on July 18, 2005. Some sixteen months earlier, the Supreme Court of the United States, on March 8, 2004, in *Crawford vs. Washington*, 541 U.S. 36, 124 S. Ct. 1354, held that testimonial, out-of-court statements by witnesses are absolutely barred by the confrontation clause unless the witnesses are unavailable *and* the defendant had a prior opportunity to cross-examine them. To the extent that Magyar entered his plea of guilty in substantial reliance upon his erroneous advice, both ineffectiveness and prejudice are present.

B. Petitioner/defendant was indicted for a violation of Section 97-3-95, Mississippi Code. One convicted of this offense is subject to lifetime registration as a sex offender and can never be relieved of the duty to register [see Section 45-33-47(2)(b), Mississippi Code, 1972, as amended]. I am informed that Petitioner/defendant was never advised by his trial counsel that lifetime registration as a sex offender was a certain result of a plea of guilty to the charged offense. Of course, to be valid, a plea must be both intelligent and voluntary. A plea is deemed "intelligent and voluntary" only when a defendant fully understands the consequences of his plea and a reasonably competent attorney will consider the facts and legal consequences of a guilty plea and communicate this analysis to the defendant. The failure of

trial counsel to make Petitioner/defendant aware of this most serious consequence of his plea fell below the level of reasonable competence such that the Petitioner/defendant did not receive effective assistance of counsel in this regard and in entering his plea of guilty without being so aware, he suffered prejudice.

C. I am informed that the proof will show that trial counsel spent a total of approximately one hour with the Petitioner/defendant prior to his plea and never showed him the discovery materials provided by the State. It is also my understanding that during the relevant period of time, the Washington County Public Defender's office lacked investigative personnel; thus, an inadequate investigation or no investigation was conducted with respect to the evidence and facts surrounding this case.

I am further advised there was in existence potentially exculpatory evidence which a reasonable investigation would have disclosed. To the extent that discovery of this evidence would have led counsel to change his recommendation as to the plea, Petitioner/defendant suffered prejudice.

These factors, taken together, constituted ineffectiveness, and to the extent that Magyar was allowed to enter his plea of guilty without being fully advised, counsel's performance was both ineffective and prejudicial.

And further, affiant saith not.

/s/ Thomas R. Mayfield
THOMAS R. MAYFIELD

SWORN TO AND SUBSCRIBED before me, this the 10th day of January, 2007.

/s/ Kelli A. [Illegible]
NOTARY PUBLIC

EXHIBIT J

Kelly Law Office, p.c.

202 East Government Street
Brandon, Mississippi 39042

Telephone: (601) 825-6455 Facsimile: (601) 825-6552

May 11, 2006

Matthew Eichelberger, Esq.
Post Office Box 3736
Wichita Falls, TX 76301-0736 EXPRESS DELIVERY

Re: Anthony Magyar, Washington
County Circuit Court
Cause Number 2005-102

Dear Matthew,

Since my correspondence sent to you on March 11, 2006, I have attempted to contact you several times by telephone and have left messages. I have not received any response from you. It was the impression of Anthony's parents that you had indicated a willingness to assist in any way you reasonably could

with regard to a post conviction collateral relief motion. You had also advised me the same. Are you still willing to assist?

If so, then please execute and return the enclosed affidavit or an amended version thereof, if any parts of the proposed affidavit are not accurate, I am willing to make any adjustments necessary and handle any time consuming details.

Anthony has now been served with a multi-million dollar complaint and civil process from the student's family. His post conviction petition needs to be filed before the thirty (30) days to answer has expired. He has approximately twenty (20) days remaining. Regarding your cooperation, time is now of the essence and delay on your behalf may cause prejudice to Anthony.

Please call me at your earliest opportunity.

Sincerely,

/s/ James L. Kelly
James L. Kelly

enc.

c: Magyar family

[POSTMARKED MAY 16, 2008]

SENDER *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.

- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Matthew Eichelberger, Esq.
P.O. Box 3736

Wichita Falls, TX 76301-0736

2. Article Number (*Transfer from service label*)
EQ 42562492145

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X /s/ [Illegible] ☐ Agent ☑ Addressee

B. Received by (*Printed Name*) | C. Date of Delivery

D. Is delivery address different from Item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

☐ Certified Mail ☒ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (*Extra Fee*) ☐ Yes

EXHIBIT J-1

AFFIDAVIT

STATE OF TEXAS

COUNTY OF Wichita

BEFORE ME, NOTARY PUBLIC, IN AND FOR THE ABOVE STATED JURISDICTION, DID COME MATTHEW EICHELBERGER, WHO, UPON HIS OATH, DID STATE, SWEAR OR AFFIRM THAT:

1. My name is Matthew Eichelberger. I reside in the State of Texas City of Wichita Falls. I am a practicing attorney, licensed to practice law in the State of Mississippi.

2. Immediately prior to my relocation to my current residence and employment I was employed as an Assistant Public Defender for the Washington County Mississippi Public Defender's office.

3. As an Assistant Public Defender for the Washington County Mississippi Public Defender's Office, I was legal counsel for John Anthony Magyar with regard to the charge of sexual battery.

4. Case reports indicate that John Magyar was arrested in Washington County Mississippi for the crime of sexual battery on January 06, 2005.

5. The office of the Washington County Public Defender was ordered to represent John Magyar on the 4th day of February, 2005.

6. At some point in time after February 04, 2005, John Magyar's case was assigned to me, by

William LaBarre, the Washington County Mississippi Public Defender.

7. John Magyar was indicted by the Washington County Mississippi Grand Jury for the offense of sexual battery on the 23rd day of May, 2005.

8. ~~During the period of time between January 06, 2005 and May 23, 2005, I did not investigate the case or charge of sexual battery against John Magyar. I am not aware whether anyone else in the Washington County Public defender's office investigated his case during that time period.~~

9. The Washington County Public Defender's Office requested discovery from the District Attorney on or about the 27th day of June, 2005.

10. John Anthony Magyar entered a plea of guilty to the indicted charge, sexual battery, upon my advice, on the 18th day of July, 2005. The plea was an "open plea", one without an agreed sentencing recommendation from the State of Mississippi. His trial was set to occur on the 19th day of July, 2005.

11. During the period of time from February 04, 2005 and July 18, 2005, I was responsible for a very large felony case load. My best estimate is that I was assigned to approximately 100 cases during that time frame.

12. During the time frame of February 04, 2005 and July 18, 2005, the investigator for the Washington County Public Defender's office was on military leave. Thus, we did not have an investigator during that time frame. One of the clerical staff made efforts to compensate for our

investigative shortage, but her efforts did not supply what was needed, as she lacked certain investigative skills and was required to devote much time to her ordinary duties.

13. During the course of my representation of John Magyar, neither I, not anyone else from the Public Defender's Office to my knowledge: interviewed the prosecutrix or interviewed the mother of the prosecutrix or interviewed personnel at the Children's Advocacy Center (who had interviewed the prosecutrix) or interviewed any person whom the prosecutrix had disclosed the alleged sexual battery to. We did interview one person, Bobby Morman, who stated (in a sworn affidavit) that the prosecutrix and previously falsely told persons that she and he were involved in a romantic relationship together.

14. No subpoena was issued or served to compel the attendance of Bobby Morman at trial[,] Mr. Magyar did disclose to me the existence of another male who claimed to have been wrongfully accused by the prosecutrix of having an intimate relationship with her. The defendant advised me that the male subject had worked at the restaurant of the prosecutrix's mother and that the false allegation had caused him to be fired. I did not discover the identity of that individual, though we did discuss obtaining personnel records from the restaurant to discover his identity. ~~I do not recall any efforts that were made by me or any one else at the Washington County Public Defender's office to locate other potential witnesses that would know about the~~

~~veracity or [character] of the prosecutrix.~~ [Annette Poe, one of our staff, interviewed other teachers and students from Greenville Christian.]

15. I did ~~not~~ view the tape of the interview between the State's expert witness (from the Children's Advocacy Center) and the alleged victim. I did not interview the State's expert witness. I did ~~[illegible]~~ discuss the existence of the video tape with the defendant and the possibility of it's use at trial.

16. We did not request funding from the Court for an investigator ~~[illegible]~~ [or] for an expert witness.

17. I did not interview the police officer's involved in the case, with the exception of Larry Miller.

18. The defense did not have any subpoena served on any witness to appear on behalf of the defendant at trial, which was scheduled to occur on the day after John Magyar entered a plea of guilty. [These subpoenas were not issued because Mr. Magyar had already decided to waive a jury trial and enter a plea of guilty.]

19. I advised John Magyar to plea guilty because I believed he would be convicted at trial. The prosecutor and I had discussed the possibility of a completely suspended sentence, but the alleged victim's mother was very much opposed to a suspended sentence, so no plea bargain was reached. I advised John Magyar that the District Attorney had considered offering a suspended sentence, but that the mother of the prosecutrix had objected to such an offer and sentence. I

advised John Magyar that an open plea, one without a sentencing recommendation from the State, would likely result in a sentence better than what the District Attorney would openly offer. I also advised him that the sentence would be entirely up to the judge.

20. I ~~did~~ [do] not ~~advise~~ [recall advising] the defendant of Mississippi sex offender registration requirements.

_____
MATTHEW EICHELBERGER

SWORN TO AND SUBSCRIBED BEFORE ME, THIS THE ___ DAY OF MAY, 2006.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

EXHIBIT K

Facts Not Within the Petitioner's Personal Knowledge

The Following facts, not within my personal knowledge, will be proven by documents in the Court file, the District Attorney's file, the file of the investigating agency, files of the Washington County Public Defender and testimony from my parents and past and present personnel of the Washington County Public Defender's Office, to wit:

1. My criminal defense counsel ("counsel" hereafter) did not cause any subpoena to be issued

requiring the attendance of any witness to testify on my behalf[, to my knowledge.]

2. Counsel did not bring any pre-trial motions to hearing to my knowledge.

3. I do not believe that Counsel personally conducted an investigation into my case and he did not request funds to hire an investigator, though the investigator for the Washington County Public Defender's office was out on military duty.

4. I do not believe that counsel made reasonable efforts to locate a witness I advised him of that would have been able discredit the prosecutrix.

5. I do not know why my lawyer moved to Texas; he did not tell me that he would be moving to Texas, but I believe that while he was advising me to plea guilty, and on the day of my guilty plea, he knew he would be moving to Texas and that he would not be in Court with me at sentencing.

6. The Washington County Public Defender advised my parents that his office did not do an adequate job defending me; my parents will testify to this.

January 12, 2007

/s/ John Anthony Magyar
John Anthony Magyar, Petitioner

EXHIBIT L

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF ~~CHOCTAW~~ [MONROE]

Before me, a Notary Public in and for this jurisdiction of ~~Choctaw~~ [Monroe] County, did come John C. Magyar, who upon his oath did state, swear or affirm that:

My name is John Craig Magyar. I reside at [Home Address Omitted], Ackerman, MS. I am the father of John Anthony Magyar. On or about the 22nd day of August 2005, after Anthony Magyar had been sentenced by the Court, I spoke with William R. Labarre, Public Defender from Washington County, MS. During that conversation with Mr. Labarre, he advised me that the Washington County Public Defender's Office had not done an adequate job of representing my son, John Anthony Magyar.

This the 13th day of December 2006.

John C. Magyar
John C. Magyar

Sworn to and Subscribed before me this the 13th day of December 2006.

Nancy H. Bishop
Notary Public

Supreme Court, U.S.
FILED
APR 15 2010
OFFICE OF THE CLERK

No. 09-862

In The
Supreme Court of the United States

JOHN ANTHONY MAGYAR,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF IN OPPOSITION

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Counsel for Respondent

October Term, 2009

QUESTIONS PRESENTED

I.

WHETHER FIFTH AMENDMENT DUE PROCESS REQUIRES THE TRIAL COURT TO ADVISE CRIMINAL DEFENDANTS CHARGED WITH SEX OFFENSES OF REGISTRATION REQUIREMENTS PRIOR TO ACCEPTING A GUILTY PLEA?

II.

WHETHER THE SIX AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES DEFENSE COUNSEL TO ADVISE CRIMINAL DEFENDANTS CHARGED WITII SEX OFFENSES OF REGISTRATION REQUIREMENTS PRIOR TO ACCEPTING A GUILTY PLEA?

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NO. 09-862

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

JOHN ANTHONY MAGYAR
Petitioner,

versus

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of John Anthony Magyar for a Writ of Certiorari to the Supreme Court of Mississippi, affirming the trial court denial on motion for post-conviction relief after pleading guilty to sexual battery.

OPINIONS BELOW

The opinion of the Mississippi Court of Appeals and the Mississippi Supreme Court affirming the conviction and sentences for sexual battery are reported as *Magyar v. State*, 18 So.3d 851(Miss.App. 2008) and *Magyar v. State*, 18 So.3d 807 (Miss. 2009). The Mississippi Supreme Court opinion may be found as "Appendix 1" and the Mississippi Court of Appeals opinion as "Appendix 14" of Petitioner's request for writ of certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has identified Constitutional provisions as set forth in the Brief of Petitioner. U.S. Const. Amend. V., VI & XIV.

STATEMENT OF THE CASE

Taken from the opinion of the Mississippi Supreme Court:

> ¶2. After John Anthony Magyar was indicted by a Washington County grand jury for one count of sexual battery, he filed a "petition to enter plea of guilty." His plea petition disclosed the maximum and minimum penalties for the crime of sexual battery, but did not disclose that he would be required to register as a sex offender, and the trial judge did not mention it during the

> plea colloquy. The trial judge accepted Magyar's guilty plea and ordered a pre-sentence investigation, following which he sentenced Magyar to twenty years in prison, with ten years suspended, followed by five years supervised probation. Additionally, the judge ordered Magyar to register as a sex offender.
>
> ¶ 3. Magyar filed a motion for post-conviction relief in the trial court, asserting that his plea and sentence should be set aside for various reasons, including that his guilty plea was not freely, voluntarily and intelligently made, and that neither the trial judge nor his attorney informed him that he would be required to register as a sex offender.
>
> ¶ 4. . . . The Court of Appeals affirmed. *Magyar v. State*, No.2007-CA-00740, 18 So.3d 851, 2008 WL 4308220 (Miss.Ct.App. Sept.23, 2008).
>
> . . .
>
> CONCLUSION
>
> ¶ 12. . . . We also hold that the duty to register as a sex offender is a collateral consequence of a guilty plea. All other aspects of the decision of the Court of Appeals in this matter are adopted herein. Accordingly, we affirm the judgments of the Court of Appeals and the Washington County Circuit Court.

Magyar v. State, 18 So.3d 807, 809 (Miss. 2009).

Defendant now seeks review by this Court with this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

I.
FIFTH AMENDMENT DUE PROCESS DOES NOT REQUIRE THE TRIAL COURT TO ADVISE CRIMINAL DEFENDANTS OF COLLATERAL CONSEQUENCES PRIOR TO ACCEPTING A GUILTY PLEA?

The Mississippi Supreme Court holding that the duty to register as a sex offender is a collateral consequence of a guilty plea and there is no Constitutional requirement that the trial court inform defendant of the duty to register, is based upon interpretation of State law and consistent with the U.S. Constitutional protections sufficient to satisfy *Brady* requirements. *Brady v. U.S.*, 397 U.S. 742 (1970).

II.
A DEFENSE ATTORNEY'S DUTY TO INFORM CLIENT OF DIRECT AND NOT COLLATERAL CONSEQUENCES OF A GUILTY PLEA IS A REASONABLY OBJECTIVE STANDARD OF PERFORMANCE UNDER *STRICKLAND.*

The law regarding sex-offender registration is varied and defined state-by-state. The "objective standard of reasonableness" for attorney performance under *Strickland* should also be based on the each states interpretation as to the direct or collateral consequence test for guilty pleas.

REASONS TO DENY THE WRIT

I.

FIFTH AMENDMENT DUE PROCESS DOES NOT REQUIRE THE TRIAL COURT TO ADVISE CRIMINAL DEFENDANTS OF COLLATERAL CONSEQUENCES PRIOR TO ACCEPTING A GUILTY PLEA?

The States enacted sex offender registration laws to fulfill the federal statutory mandate created by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program. 42 USC §14071, et seq. As state statutory enactments, under of principles of federalism, each state's statutory scheme varied considerably from each other.

As would be expected with each states registration law varying from the others, the question of an individual's right to be informed of registration duties upon a plea of guilty are dependent upon each states laws, and case law applications of Constitutional law.

Our federal courts in interpreting these individual state schemes and Constitutional implications have held:

> . . . . **An overwhelming majority of courts, including the South Dakota Supreme Court, that have considered the issue have concluded that a sentencing court's failure to advise a defendant about registration as a sex offender is not grounds for withdrawal of a guilty plea because registration is a collateral, not a direct, consequence of conviction**. . . .
>
> *Whitepipe v. Weber*, 536 F.Supp.2d 1070, 1108 (D.S.D. 2007).

Because the interpretation of whether a defendant's guilty plea is based upon state statutory and case law interpretation there will, inherently, be differences between the several states.

The question then becomes whether each state, regardless of whether the duty to register is a direct or collateral consequence of a guilty plea, fulfills Constitutional protections regarding the voluntariness of the guilty plea.

> . . . **[T]he issue here-whether being ordered to register as a sexual offender is a direct or collateral consequence-is not sufficiently clear cut to permit us to conclude that the state court's decision was contrary to, or an unreasonable application of, *Brady*. Indeed, to the very limited extent that the decisions of the courts of appeals can "guide us in determining what constitutes an unreasonable application" of clearly established Supreme Court precedent, see Wilson v. McGinnis, 413 F.3d 196, 199 (2d Cir.2005), these decisions indicate that no clearly established federal law requires that defendants be informed of the possibility that they could be ordered to register as sexual offenders.** . . .
>
> *Virsnieks v. Smith*, 521 F.3d 707, 716 (C.A.7 (Wis.) 2008)(emphasis added); followed in *Laemmle v. Michaels*, 2009 WL 2602065 (W.D.Pa. 2009).

Consequently, the Mississippi Supreme Court holding that the duty to register as a sex offender is a collateral

consequence of a guilty plea and there is no Constitutional requirement that the court inform defendant of the duty to register, is based upon interpretation of State law and consistent with the U.S. Constitutional protections sufficient to satisfy *Brady* requirements. *Brady v. U.S.*, 397 U.S. 742 (1970).

Consequently, there is no infirmity in the Mississippi Court's interpretation of our state statutes or application of Constitutional protections. The fact that the several States vary in their interpretation on the same question, based on each state's law, does not present a cognizable claim and the petition for writ of certiorari should be denied.

II.
A DEFENSE ATTORNEY'S DUTY TO INFORM CLIENT OF DIRECT AND NOT COLLATERAL CONSEQUENCES OF A GUILTY PLEA IS A REASONABLY OBJECTIVE STANDARD OF PERFORMANCE UNDER *STRICKLAND.*

Recently in *Padilla v. Kentucky,* ____ U.S. ____, (2010)(decided March 31, 2010), this Court held that deportation as a result of a guilty plea was a unique consequence, – being difficult to classify as either a direct or collateral consequence. Consequently, defense counsel must now inform clients whether a plea carries a risk of deportation.

Petitioner, asks this court to adopt a similar rationale and hold that defense counsel must inform defendant of sex offender registration consequences that will follow a guilty plea.

As enunciated in *Padilla*, under the *Strickland* analysis the court must first determine whether representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

It is the position of respondent, State of Mississippi, that sex offender registration, with the associated variance among the several states, is sufficiently defined to fit the direct or collateral consequence test. While that duty varies from state to state, it is clear – state by state – what an attorney's duty is to his client. If a state defines or hold 'sex offender registration' to be a 'direct' consequence of a guilty plea; – the duty is to inform the defendant. If a state defines or holds 'sex offender registration' to be a 'collateral' consequence of a guilty plea; – there is no duty to inform the defendant.

Under this application, the law on point is sufficiently delineated to be clear to set an 'objective standard' of performance for defense counsel:

The consequences of which the defendant must be aware before pleading guilty are the "direct consequences" of the plea. *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (internal quotation marks omitted). Courts of appeal have generally understood *Boykin* and *Brady* to mean that a defendant pleading guilty must be aware of the direct consequences of the plea but need not be informed of the indirect or collateral consequences of a guilty plea. See United States v. Sambro, 454 F.2d 918, 922 (D.C.Cir.1971) (per curiam) ("We presume that the Supreme Court meant what it said when it used the word 'direct'; by doing so, it excluded collateral consequences."); see also Virsnieks v. Smith, 521 F.3d 707, 715 (7th Cir.2008) ("[A]lthough a defendant must be informed of the direct consequences flowing from a [guilty] plea, he need not be informed of collateral consequences."); Meyer v. Branker, 506 F.3d 358, 367-68 (4th Cir.2007) ("For a guilty plea to be constitutionally valid, a defendant must be made aware of all the 'direct,' but not the 'collateral,' consequences of his plea."), cert. denied, --- U.S. ----, 128 S.Ct. 2975, 171 L.Ed.2d 899 (2008).

Appleby v. Warden, Northern Regional Jail and Correctional Facility, 595 F.3d 532, 541-542 (C.A.4 (W.Va.) 2010).

The law in Mississippi is that sex offender registration

is a 'collateral consequence' to a guilty plea. *Magyar v. State*, 18 So.3d 807, 809 (¶12)(Miss. 2009). As such, counsel's claimed failure to inform defendant of his duty to register as a sex offender was not deficient performance.

Accordingly, the State would ask this court to apply the direct/collateral consequence test as the objective standard of attorney performance applicable to the first prong analysis under *Strickland*.

Padilla found deportation to be 'unique,' and the law clear, succinct and enunciated clearly enough to require defense counsel to inform client regarding the risk of deportation after a plea of guilty *Padilla*, slip op. page 9-11.

Sex offender registration is not subject to such a single controlling federal statutory scheme as is immigration. While there is federal enabling legislation for sex offender registration, – the actual definition, requirements and consequences are left for each state to implement.

Consequently, the law regarding sex-offender registration is varied and defined state-by-state. The "objective standard of reasonableness" for attorney performance should also be based on the each states interpretation as to the direct or collateral consequence test.

Again, the fact that the several States would have a different 'objective' standard for attorney performance in informing criminal defendants of their duty to register as a sex does not present a cognizable claim and the petition for writ of certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the State of Mississippi asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 09-862

In The

Supreme Court of the United States

JOHN ANTHONY MAGYAR,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari
To The Mississippi Supreme Court

PETITION FOR REHEARING

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PETITION FOR REHEARING

PETITIONER RESPECTFULLY MOVES THIS COURT FOR AN ORDER (1) VACATING ITS ORDER OF MAY 17, 2010, WHICH DENIED THE PETITION FOR WRIT OF CERTIORARI FILED BY PETITIONER ON JANUARY 20, 2010, AND (2) GRANTING THE PETITION FOR WRIT OF CERTIORARI. THE GROUNDS FOR REHEARING ARE STATED BELOW.

REASON FOR GRANTING REHEARING

INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL AND CONTROLLING EFFECT HAVE OCCURRED SINCE PETITIONER FILED HIS PETITION FOR WRIT OF CERTIORARI.

WHILE PETITIONER'S PETITION FOR WRIT OF CERTIORARI WAS UNDER CONSIDERATION BY THIS COURT, THE COURT RULED IN *PADILLA V. KENTUCKY*, ___ U.S. ___, 130 S. CT. 1382 (MARCH 31, 2010), THAT AN IMMIGRANT TO THE UNITED STATES MUST BE ADVISED BY HIS LEGAL COUNSEL, PRIOR TO PLEADING GUILTY TO A CRIMINAL OFFENSE, THAT A CRIMINAL CONVICTION WOULD HAVE SEVERE ADVERSE IMMIGRATION CONSEQUENCES TO HIM, AND THAT FAILURE OF HIS COUNSEL TO ADVISE HIM OF THOSE ADVERSE IMMIGRATION CONSEQUENCES CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH

AMENDMENT TO THE UNITED STATES CONSTITUTION.

PRIOR TO *PADILLA V. KENTUCKY*, COURTS WERE VERY RELUCTANT TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO ADVISE OF COLLATERAL CONSEQUENCES. SOME CONSEQUENCES HOWEVER, BEING SO CLOSELY CONNECTED TO THE CRIMINAL PROCESS, ARE UNIQUELY DIFFICULT TO CLASSIFY AS EITHER DIRECT OR COLLATERAL. *PADILLA V. KENTUCKY*, 130 S. CT. 1382 (MARCH 31, 2010), FINDS THAT DEPORTATION IS ONE OF THOSE UNIQUE CONSEQUENCES; MANDATORY SEX OFFENDER REGISTRATION IS ANOTHER.

SEX OFFENDER REGISTRATION IS JUST AS, IF NOT MORE, CLOSELY CONNECTED TO THE CRIMINAL PROCESS AND AUTOMATIC THAN DEPORTATION. JOHN ANTHONY MAGYAR'S COUNSEL FAILED TO ADVISE HIM OF MANDATORY LIFETIME SEX OFFENDER REGISTRATION REQUIREMENTS PRIOR TO HIS GUILTY PLEA TO A SEX OFFENSE. THE LOWER COURTS HAVE DENIED RELIEF TO MAGYAR DUE TO REGISTRATION BEING A "COLLATERAL CONSEQUENCE."

MAGYAR WOULD RATHER FACE DEPORTATION THAN A LIFETIME OF UNEMPLOYMENT, SCORN AND EXILE FROM SOCIETY,

FOR MANY, A MORE SERIOUS CONSEQUENCE THAN DEPORTATION.

John Anthony Magyar entered a guilty plea to a sex offense in state court without having been advised by the trial court, or his court appointed legal counsel, that a sex offense conviction automatically results in being sentenced to lifetime registration as a sex offender. Magyar initially learned of mandatory lifetime sex offender registration at sentencing, and thereafter petitioned for post conviction collateral relief, seeking to set aside his plea due to not having received effective assistance of counsel (among other grounds). The trial court denied Magyar's motion without affording Magyar a hearing, denying Magyar an opportunity to show prejudice and without requiring the State of Mississippi to file an answer.

Both the Mississippi Court of Appeals and the Mississippi Supreme Court[1] affirmed, using the wrong legal standard, resulting in a violation of Magyar's Sixth Amendment right to counsel, yet to be cured.

The Mississippi Court of Appeals, erroneously using the due process standard applicable to trial courts, affirmed the trial court's ruling regarding the effectiveness of counsel claim. Subsection II. of the Mississippi Court of Appeals opinion is entitled: ***Was***

---

[1] Expressly adopting the Mississippi Court of Appeals opinion on this claim. "All other aspects of the decision of the Court of Appeals in this matter are adopted herein." Pet. at App. 9.

Magyar's counsel ineffective? Pet. at App. 22. In that section, the opinion reads:

> ***As discussed above, Mississippi law does not require that Magyar be informed that he has to register as a sex offender for his guilty plea to be knowing, intelligent, and voluntary. . . .***

Pet. at App. 24.

The "discussed above" portion of the opinion which the Mississippi Court of Appeals was referring to was summed up earlier, in the due process portion of the opinion, by the Mississippi Appeals Court stating:

> ***We find that the fact that Magyar must register as a sex offender is merely a collateral consequence of his guilty plea. We find that this issue[2] is without merit.***

From the outset, the Mississippi Court of Appeals had been asked to review the effectiveness of counsel claim from a United States Constitutional standpoint, not only "Mississippi law" as the Court of Appeals generally referred to when denying Magyar's claim. Further, and perhaps more importantly, the Mississippi Court of Appeals, and by express adoption, the Mississippi Supreme Court, erroneously recited and applied the "knowing, intelligent, and voluntary" standard of due process analysis to Magyar's Sixth

---

[2] Due Process

Amendment Effectiveness of Counsel Claim, and upon that inapplicable ground, denied Magyar's Sixth Amendment claim. In reaching its conclusion that Magyar's Sixth Amendment right to counsel had not been violated, the lower Courts declared that counsel did not have the duty to advise Magyar of sex offender registration because such registration was "merely a collateral consequence of his guilty plea." Pet. at App. 20.

Thus, Magyar's petition comes before this Court in a nearly identical posture as did ***Padilla v. Kentucky***. In ***Padilla***,

> **. . . the Supreme Court of Kentucky denied Padilla post conviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction. . . .**

Padilla v. Kentucky, 130 S. Ct. 1382 (March 31, 2010).

The collateral versus direct consequence distinction is a constitutional fabrication regarding Sixth Amendment jurisprudence. It has never been applied by the United States Supreme Court. ***Padilla v. Kentucky***, 130 S. Ct. 1382 (March 31, 2010). Lower courts should not be allowed to apply that distinction preserved for the analysis of the duties and conduct of

trial judges to the review of duties and conduct of counsel, two entirely different duties altogether.

Regardless of how this Court would view the above position, like the consequence of deportation in ***Padilla***, due to the unique nature of mandatory life time sex offender registration, it is not necessary to now determine whether the collateral versus direct consequences analysis should be applied to effectiveness of counsel claims.

Whether or not sex offender registration is technically a "criminal penalty," it is part of the sentence in the criminal proceeding. It is intimately related to the criminal process. Like deportation, sex offender registration is automatic. Like deportation, the judge has no discretion whether or not to order registration and even if he/she does not order it, the defendant is still subject to it (registration or deportation). Like deportation, it would be most difficult to divorce sex offender registration from the conviction requiring it. The trial judge is required to order it, the legislature (or Congress with regard to deportation) mandates it and if the defendant fails to do it, he commits another criminal offense. Like deportation, mandatory sex offender registration, *as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.*[3]

---

[3] "Whether post-release registration is a collateral or direct consequence of a guilty plea is, admittedly, a close question; it

(Continued on following page)

See ***Padilla v. Kentucky***, 130 S. Ct. 1382 (March 31, 2010) at Section II. Like deportation, this claim should also be subject to ***Strickland v. Washington***, 466 U.S. 668 (1984) analysis, which the lower courts effectively refused to do.

Moreover, mandatory lifetime sex offender registration would be and is, for many citizens of the United States, every bit as severe and devastating as deportation is for many non-citizens. The Mississippi sex offender registration statute, like those of many states, is extremely broad, severe and inclusive with regard to (1) who must register for life and (2) how the registrant is forever limited. It includes minors adjudicated delinquent in Youth Court, and persons found not guilty by reason of insanity. See M.C.A. § 45-33-27(1) (1972). Those subject to the statute:

> – will submit address, name, place of employment, date of birth, age, race, sex, height, weight, hair color, place of birth, date and place of Court adjudication and social security number and "any other identifying factors" to the local law enforcement of any community she shall ever live in;
>
> – submit DNA samples to law enforcement, to be included in computer data base;
>
> – submit fingerprints to be included in data base;

---

is certainly definite and automatic." ***Magyar v. Mississippi, Kitchens Concurring***, Pet. at App. 12.

– submit to law enforcement any online username, screen name or online identity he has ever used;

– submit to law enforcement information regarding any anticipated future residence;

– may not reside within 1500 feet (500 yards) of any public or private school (or its property);

– may not reside within 1500 feet of any child care facility;

– may not reside within 1500 feet of any playground;[4]

– may not reside within 1500 feet of any ball park "or other recreational facility";

– may not be present in a school, or stand within 500 feet of a school without special permission;[5]

– must show proof of domicile and personally appear at the department of public safety 10 days before moving to another residence;

– personally appear at the Department of Public safety within 3 days of any change of employment M.C.A. § 45-33-29(3); and

---

[4] 2008 amendment to M.C.A. § 45-33-25(4)(a) (1972) as amended.

[5] M.C.A. § 45-33-26 (1972) as amended.

> – personally appear at the Mississippi Department of Public Safety, **every 90 days**, for the remainder of her life, give a new photo, update all information, including residence and employment, and pay "any required fees."

Registrant information will be placed on the internet, for the world to see, forever. The registrant will be a target of ridicule and scorn, people will protest if he moves to the neighborhood, parents will not let their children play with his children, he will have extreme difficulty finding employment. Magyar, of course, represents thousands of criminal defendants, adult and juvenile, facing charges of sexual misconduct, often facing attractive plea offers of minimum incarceration or probation, who have no idea that accepting such an offer actually triggers a life sentence of exile. Without question, the Mississippi registration act imposes onerous permanent obligations and burdens upon the life of the registrant. It is not burdensome however, upon competent legal counsel, to advise the client, at least to some minimal extent, that public registration would be required upon a guilty plea. Given the complexities of immigration law, the burden of giving general sex offender registration advice would be slight compared to giving accurate immigration advice to non-citizens facing criminal charges, which is now constitutionally required under ***Padilla***.

CONCLUSION

Padilla v. Kentucky, 130 S. Ct. 1382 (March 31, 2010), having been decided while this petition for writ of certiorari is under consideration, the Court is urged to reconsider granting the writ requested. Like deportation, life-time sex offender registration is swift, certain and severe, and cannot be divorced from the criminal process. It is the most definite consequence of a sex offense criminal conviction and is often the most severe, lasting forever. To divorce advising a criminal defendant of the definite, severe consequence of mandatory life-time public registration, from the defense attorney's obligation is absurd. Like deportation, it is a consequence that is unique and ill suited for the collateral versus direct consequence analysis.

Sex offender registration requirements in nearly all states impose great and permanent burdens and restrictions upon the lives of registrants. Some states, including Mississippi, limit where offenders may reside and require a personal appearance registration update, every 90 days, at the local Sheriff's office or other government agency. Updates must also be given in other instances such as whenever the registrant changes residence or his or her physical appearance. Failure to strictly comply constitutes a separate felony offense. Much information about the offender is placed in the public domain for all to see. The offender is forever shunned from normal society. The registration requirements are the most definite, automatic and immediate consequences of a guilty

plea to a sex offense. Other aspects of sentencing are discretionary with the trial court, while registration requirements are not discretionary. Despite the severe, automatic nature of sex offender registration requirements however, most states have determined that such requirements are mere collateral consequences to a guilty plea and therefore, Fifth Amendment Due Process does not require Courts to advise the criminal defendant of the requirements prior to a guilty plea and the Sixth Amendment does not require counsel to do so.

Some courts have held that counsel's failure to advise a criminal defendant of mandatory sex offender registration constitutes ineffective assistance of counsel (especially where elements of mis-advice are present as in Magyar's case), while the majority of courts have ruled to the contrary. More often than not, courts failing to find ineffective assistance of counsel in these circumstances reach its conclusion by applying the Fifth Amendment Due Process "collateral consequence rule" analysis. Such analysis is erroneous as effective counsel's duty to the defendant is much more broad and different from the duties of the court. This Court should grant certiorari to settle the question of whether the Fifth Amendment Due Process collateral consequences rule should be applied to ineffective assistance of counsel questions and specifically, to settle the dispute as to whether or not counsel's failure to advise a client of mandatory lifetime sex offender registration constitutes

ineffective assistance of counsel under the Sixth Amendment to the United States Constitution.

Given that mandatory registration is so similar to mandatory deportation and given the holding in ***Padilla v. Kentucky***, the lower courts will soon be faced with the issues here raised regarding sex offender registration on a more frequent basis. It could take years of inconsistent results before the issue comes again to this Court. The issue is now ripe however, for resolution.

For the reasons as set forth above, the petitioner submits that his rights under the Fifth and Sixth Amendments to the United States Constitution have been violated and requests that appropriate relief be granted unto him, including, but not limited to his plea of guilty being vacated and set aside, or in the alternative, as in ***Padilla v. Kentucky***, 130 S. Ct. 1382 (March 31, 2010), that this matter be remanded to the trial court for a hearing on the issue of prejudice.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

JAMES L. KELLY